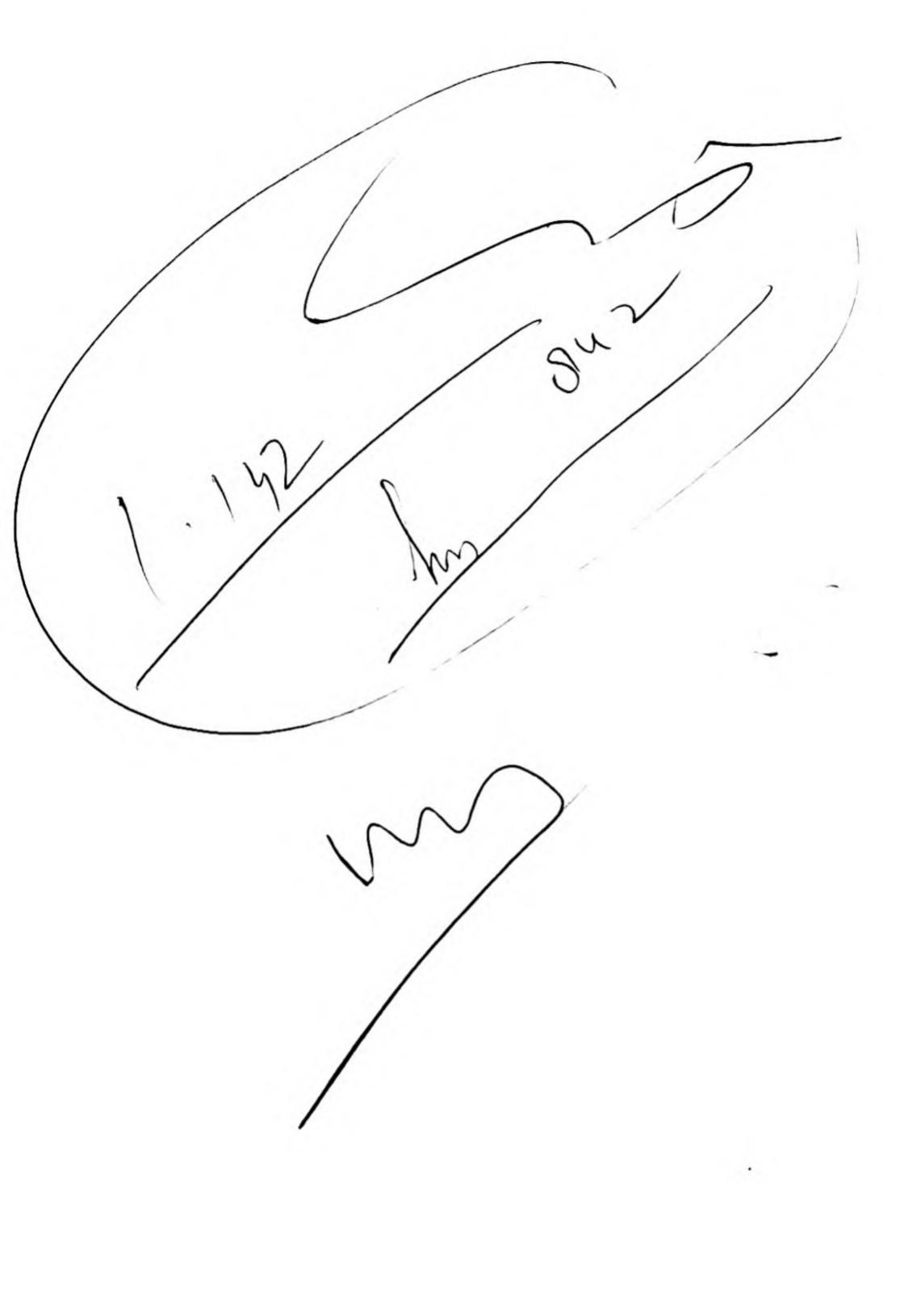
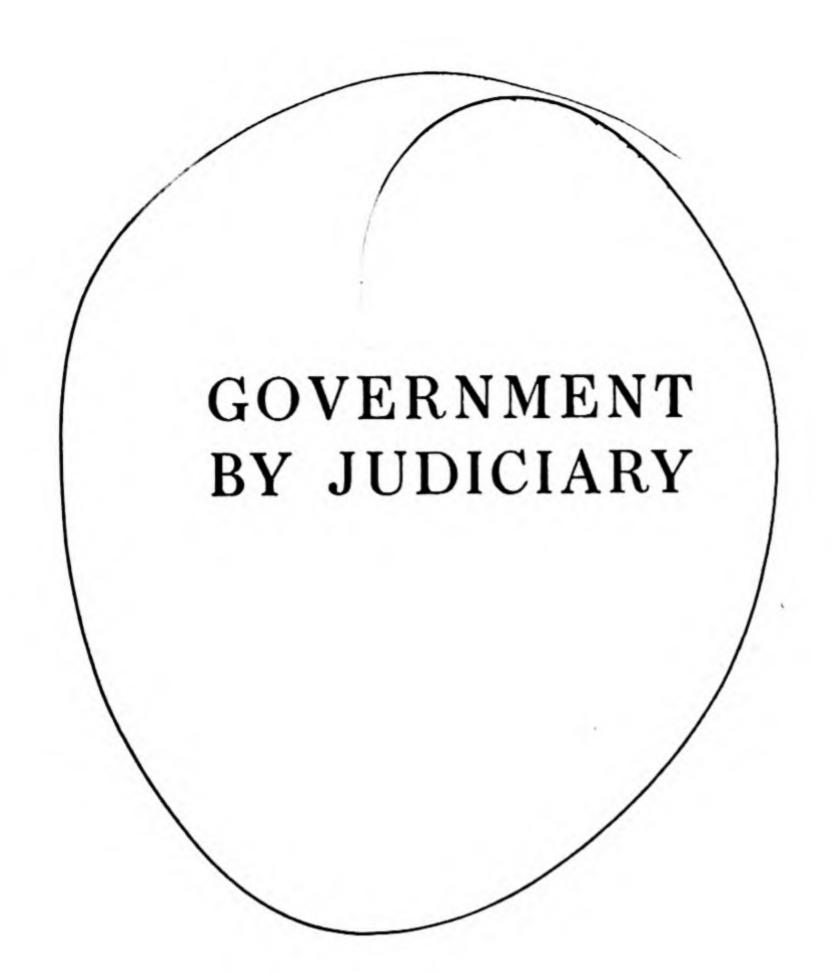
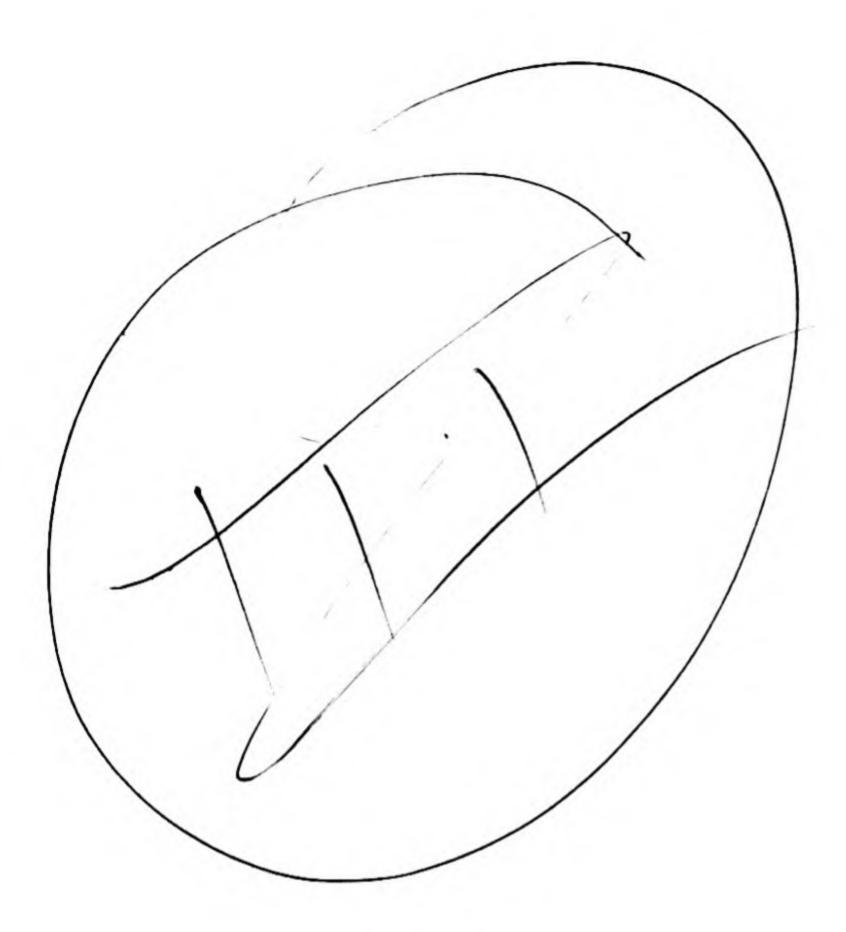
FREE GIFT









GOVERNMENT BY JUDICIARY

LOUIS B. BOUDIN

VOLUME I

NEW YORK / RUSSELL & RUSSELL

340.0973 BIG1



FA F MIR LINIVERSITY

lobal Library

PIRY OI

FIRST PUBLISHED IN 1932 REISSUED, 1968, BY RUSSELL & RUSSELL A DIVISION OF ATHENEUM HOUSE, INC. L. C. CATALOG CARD NO: 66-27042 PRINTED IN THE UNITED STATES OF AMERICA

By WAY OF INTRODUCTION

Na sense it may be said that it is the purpose of the present work to prove one statement made by Mr. Justice Oliver Wendell Holmes and to disprove another,—although both of these statements were made after the present work was practically finished and at the time of its commencement the writer had no expectation that Judge Holmes would make either of them.

The earlier of these statements—the one the present writer has endeavored to disprove—was made by Judge Holmes in an official opinion, handed down by him as Associate Justice of the United States Supreme Court in the case of Blodgett v. Holden, (275 U.S. 142), decided November 21st, 1927. It refers to the right of our Judges to declare laws unconstitutional and occurs in the following paragraph. Says Judge Holmes:

"Although research has shown and practice has established the futility of the charge that it was a usurpation when this court undertook to declare an act of Congress unconstitutional, I suppose that we all agree that to do so is the gravest and most delicate duty that this court is called on to perform."

Such a statement coming from such a source should give pause to any one—and the present writer is second to none in his admiration for the Grand Old Man of American Jurisprudence. Nevertheless, he ventures to assert that the present work disproves the correctness of this statement as contained in the italicized words; and that the charge referred to by Mr. Justice Holmes, frequently made before and reiterated by the present writer in an essay published by him twenty years ago in the Political Science Quarterly (Government by Judiciary, 26 P.S.Q. 238; June, 1911), is fully sustained by the facts and considerations presented in these volumes.

This belief notwithstanding, the term "usurpation" has never been used by the author in this work as his own characterization of the assumption of power involved—for the reason that the use of this term places the emphasis on a wrong aspect of the historical phenomenon under consideration. To the "legitimist" the most important question about the Napoleonic régime was the great Corsican's "usurpation." But to the true historian this is a comparatively minor matter in estimating the character and quality of that régime. Also, the use of that term is misleading, in that it gives an entirely erroneous impression of the meaning of Chief Justice Marshall's act in delivering his famous dictum in Marbury v. Madison. The impression created is that on the American Eighteenth Brumaire, which happened to be February 24th, 1803, John Marshall put the crown on his head by delivering his celebrated opinion, and that thereupon the American Court Empire as we know it was complete. This is history as she is usually written, by official historians as well as "muckraking" radicals. With this difference: According to the official historians the crown was forged in the smithy of the "Framers" and lay more or less hidden in the folds of the Constitution,—like Wotan's sword embedded in the oak, waiting for Siegmund to bring it forth and use it for mighty deeds—so that nothing actually took place on February 24th, 1803, but a legitimate coronation, when the rightful heir assumed the crown rightfully his. While the "muckraking" radicals contend that the act amounted to a usurpation of powers never granted by the Constitution, and the exercise of which by the court is a continuous invasion of the rights of the Legislature.

But nothing is further from the truth. Marshall's decision was far from the dramatic event which it is usually pictured to have been. Nor did it have the implications usually ascribed to it. It is our contention that Marshall's act was not warranted by the Constitution, and that the present exercise of power by the Judiciary is not warranted by the courts' own theory of the Constitution as laid down by Marshall. And the second half of this double-header is in our opinion more important than the first half, important as that undoubtedly is. Hence the actual plan of this work, which—while giving to the pre-Marbury history of the Judicial Power all the attention it deserves—devotes most of its attention to the development of that power since the decision of that famous case, in an endeavor to prove that there was not one dramatic assumption of power, but rather a continuous and gradual encroachment by the courts upon the legitimate rights of legislature, executive and people. So that what was admittedly intended to be a government consisting of three equal and coordinate departments, with the primacy in the Legislature and the ultimate power in the people themselves, has in course of time, through work which Jefferson had characterized as that of "sappers and miners" steadily working to undermine the Constitution, become what some of the Judges have themselves termed a Judicial Despotism, with all powers lodged in an irresponsible judiciary.

This brings us to the second of Mr. Justice Holmes' statements. As we have seen, Mr. Justice Holmes believes that the courts rightfully exercise the power of declaring laws unconstitutional. But what is that power? The official theory as laid down by Marshall in Marbury v. Madison, and as it has been re-affirmed and re-asserted many times since, is that it is a necessary consequence of our system of government, and that its existence depends upon, and its exercise is measured and limited by, that necessity. It is a fundamental point in this theory that the courts have no general supervisory power over legislation, but that when in the course of the regular administration of their own business, the courts are confronted with the dilemma of following either the Constitution or a legislative enactment which conflicts with the Constitution, they are of necessity compelled to follow the Constitution rather than the legislative enactment, since the Constitution is superior to both courts and legislature. It is a necessary corollary to this fundamental position, and therefore a canon of constitutional "interpretation" well-recognized by the official theory, that before a statute can be "disregarded" its conflict with the Constitution must be clear and beyond doubt. In other words, the primary duty of judges is to enforce the law as made by the Legislature, unless they have a clear mandate from the Constitution itself to do the contrary. If this theory, announced by the courts themselves, were observed in practice, the question of the rightfulness of the power, while still important, would not be so pressing a problem to the people of this country as it actually is, for the simple reason that cases where either Congress or state legislatures disregard a clear mandate of the Constitution are so rare—if any have ever occurred at all—that the question would be rather of theoretical interest to philosophically-minded students of our system of government than of practical import to the ordinary citizen.

Unfortunately, the official theory does not at all tally with the

facts. The actual practice of the courts is to declare any law unconstitutional of which they strongly disapprove, whatever the reason of such disapproval, and quite irrespective of the actual provisions of the Constitution, which very frequently says nothing at all on the subject. So much so, that to declare laws unconstitutional has become a matter of almost daily routine for the judicial machine, and "unconstitutional" has become a "term of art," as the lawyers call it, a façon de parler, a manner of speaking, the real meaning of which is: "We, the judges, think this is a bad law." The Constitution has ceased to be the measure of the Judicial Power or any check or limit to the judges' exercise of the power to declare legislation unconstitutional. The Judges have in fact become superior not only to the Legislature but to the Constitution itself, since the Constitution is what the judges say it is.

This is well-known to the élite of the legal profession, who speak of it more or less openly in the professional press. It is also stated occasionally by judges,—usually in dissenting opinions, and almost always in technical language not easily understood by the uninitiated. But recently Mr. Justice Holmes has been goaded by his brethren on the Supreme Bench into saying it without circumlocution in plain and forceful English. In a dissenting opinion in the case of Baldwin v. Missouri, (281 U.S. 586), decided on May 26th, 1930, Mr. Justice Holmes, (Justices Brandeis and Stone concurring), said:

"Although this decision hardly can be called a surprise after Farmers' Loan & Trust Co. v. Minnesota, 280 U.S. 204, and Safe Deposit & Trust Co. v. Virginia, 280 U.S. 83, and although I stated my views in those cases, still, as the term is not over, I think it legitimate to add one or two reflections to what I have said before. I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this court as for any reason undesirable. I cannot believe that the amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred."

It is the correctness of this statement of the great Associate Justice of the United States Supreme Court, that there is "hardly any

limit but the sky" to the power of the Judiciary because the Constitution has ceased to be the measure of "constitutionality," that these volumes prove, by giving a circumstantial account of the most important judicial decisions during the past forty years. But these volumes do more than that: They cover the history of more than forty years, and consider more than the "constitutional rights of the States." They give a fairly complete history of the growth of the Judicial Power, from the first modest assertion of its rights by John Marshall as a necessary "last resort" power—to be resorted to in extreme cases in order not to make the courts participants against their will in legislative defiance of the Constitution -to its present position of command, when it can, and does, bid defiance to the people and the Constitution, so that its most distinguished member must repeatedly rise in protest and cry out in anguish that there is "no limit but the sky" to what it may and does do, since the Constitution no longer furnishes any restraint upon its action.

And in the course of this history, it becomes apparent that it is not even a question of "strict" or "liberal" interpretation of the Constitution. With the disappearance of the Constitution as the measure of "constitutionality," these terms, which played such a great part in old-fashioned histories, have lost their meaning. While judges still divide into "schools," these schools are not the result of different methods of interpreting the Constitution, but relate to the judges' general outlook upon life, chiefly economic life. Hence we find judges who in one case favored what might be called a "strict construction" of the Constitution adopting in another case what used to be called a "liberal interpretation" of that document. The alignment—whenever there is an alignment—is seldom, if ever, based upon some particular method of constitutional interpretation; the line of division usually being some economic or political assumption or predilection which determines the judges' opinion as to what is desirable or undesirable in legislation, or in the power to legislate which ought to be permitted to legislatures.

It is part of the official theory that the right of the courts to declare laws unconstitutional is necessary to the end that this may be a government of laws and not a government of men. Mr. Justice Holmes' last statement not only proves our government to be one of men, but stamps it as one of irresponsible men. And of

that, too, these volumes furnish abundant proof. For the details of our judicial history, recited in these pages, show how decisions of the gravest political consequence, decisions affecting the welfare of the people and the destinies of the country, frequently depended on the will or whim of some one Man, or on the accident of whether this or that Man happened to sit in the seat of power. A careful review of the facts of our history on this showing forces one to the conclusion that the only real difference in this respect between our government and the governments of other civilized countries is that in other countries the Men are accountable to the people, and their decisions subject to be revoked and reversed by the people; while in this country the Men who wield the real power of government are not accountable to the people, and their decisions are irrevocable and irreversible except by themselves. The net result is that we are ruled frequently by dead Men (not, however, the dead "Framers," but generations of dead judges), and always by irresponsible Men.

New York, May, 1931.

By WAY OF EXPLANATION

In the preceding introductory note, I have attempted to state the general purpose of this work. But I feel that I owe my readers—and some friends whose advice I did not take—an explanation with regard to the manner in which I went about the performance of my task. Perhaps the best way of doing it is to answer in advance some expected criticism.

The first criticism of this work which will naturally suggest itself relates to its purpose. The purpose of the work has already been stated. But a purpose ought to be practical. And what practical results can one expect from attacking the existence of the Judicial Power—particularly since the book does not suggest any remedy, any way of either abolishing or curbing it? The answer is that I believe there is a remedy—or, rather, a choice of remedies—but that I considered the discussion of remedies premature, in view of the fact that most people do not understand the nature of the disease from which our body politic is suffering.

One of the best-known liberal judges of this country, who knew I was working at my task, once asked me, with a shrug of the shoulders—"What's the use?" This question and shrug of the shoulders is typical of the attitude of our liberals towards the Judicial Power. It is based on the firm conviction that a frontal attack upon that Power is hopeless. The logical result of this conviction is a program of prayer. We must pray—and occasionally argue-for good men in the seat of power. I am at once more optimistic of the situation as a whole and less so about the efficacy of prayer. I do not think that the prayer for good men is of much use—once we dare not attack the foundations of the power which these men wield. On the other hand, I think the case is not quite as hopeless as the noted judge's question would indicate. I believe that if the Judicial Power is impregnable—and I am ready to admit that it is so to all appearance—it is due largely to the unwillingness of liberals to fight which is also indicated by the same question. I confess to being old-fashioned enough to believe in old-fashioned democracy. What is more, I believe that the people of the United States are not ready to abdicate their right to self-government. And if they have actually done so—and this book proves that they have—it is because they did not know what they were doing, and still do not know what has actually happened to them. The Judicial Power is based not so much on an initial act of usurpation as on continued ignorance as to the actual workings of our governmental system, which leaves the illusion of self-government while destroying its substance. It is my belief that if the true inwardness of this system were to become generally known its days would be numbered—unless, perhaps, the "good men" were put in power by the beneficiaries of the system as a means of saving it.

This makes my purpose practical. It also limits my task. If I succeed in bringing home to the people the true nature of the system I am attacking, they can be relied upon to take care of the question of remedies. My task, as I conceive it, is best expressed by a statement once made by the late Frederick R. Coudert, staid and conservative leader of the bar:

"As Dr. Johnson says: 'Let us rid ourselves of cant'; let us not do one thing and say another; let us not act upon the theory that the Constitution is as unchangeable as the law of the Medes and the Persians, when it is being constantly changed by judicial interpretation, in many respects quite as effectually and much more easily than it could be by amendment in the prescribed form." (Certainty and Justice, p. 60.)

This brings me to another type of objection that will probably be made against the present work—namely, that I am not "disinterested," and my work, therefore, not really scientific. My answer to that kind of criticism has been given long ago by Dr. Johnson, in the admonition quoted by Mr. Coudert. There is no such thing as "disinterested" scientific work in any branch of science, and certainly not in the social sciences. There is, of course, a lot of pseudo-scientific writing—particularly of the "text" type—which pretends to be disinterested. But the only time it is really disinterested in the kind of knowledge it purveys is when its interest is limited to the number of shekels it gathers. Whenever any work rises above that level, it acquires a scientific purpose and thereby ceases to be "disinterested." The distinguishing characteristic of a work of science is not that its author is "disinterested,"

but that the nature of his interest is such as to lead him to see the truth and tell it without reservations.

Unfortunately, many workers in our science, owing to the conditions of their work, often find it convenient, and sometimes absolutely necessary, to clothe their thoughts in seemingly disinterested language. This has had the unfortunate result of creating the impression that if a book calls a spade a spade—instead of using some circumlocution—it has somehow lost scientific standing. Needless to say, the impression is erroneous as well as harmful. And since I am, fortunately, not compelled by the conditions of my work to make a virtue of the usual academic necessity, I have discarded the circumlocutions and suppressions which are usual on such occasions. This may prevent my book from becoming "required reading" in some colleges and universities, but it will help to bring home some truths which the usual circumlocutions tend to hide, or at least obscure.

Manner aside, the question is one of proof. And here I was confronted with a serious problem of mechanics or form. The major portion of the work is devoted to proving the proposition that our actual Constitution—the Constitution we live under—is not only different from what the Framers intended it to be, but also from what John Marshall said it was. But, as Mr. Coudert has pointed out, we pretend that "the Constitution is as unchangeable as the laws of the Medes and the Persians" and that we are still living under the Constitution of 1787. In order to keep up that pretense, the courts have developed a technique which makes it extremely difficult for non-specialists to penetrate the veil of mystery with which the actions of the judges as the real governors of the country have been surrounded. The mere mass of words used is such as to make it impossible for an ordinary person to digest them. The opinions in the recent case of Myers v. United States, which effected a revolution in our governmental machine, consist of about seventy-five thousand words. Who but specialists can be expected to read this mass of words, even if one could tell from a reading of them what it is all about? But in most cases one can not. In order to be in a position to form a judgment on the matter in controversy—nay, in order to understand the significance of what is being done—one must be in a position to check up the

given decision against many previous decisions. In other words, one must be a specialist.

Under these circumstances, the task of writing a book for non-specialists, the sum and substance of which is, when reduced to its lowest terms, that the specialty itself is largely mummery and pretense, becomes rather difficult. When the Minimum Wage law was declared unconstitutional by the Supreme Court, Prof. Thomas Reed Powell of Harvard said in the Harvard Law Review:

"Literary interpretation of the Constitution has nothing whatever to do with it. Neither legal learning nor economic exposition can explain it. Arguments pro and arguments contra have no compelling inherent power. The issue was determined not by the arguments but by the arbiters. . . . The talk in the consultation chamber must often be very different from the talk in the published opinions."

How get behind the published opinions? Or, rather, behind their verbiage, to their real meaning? My solution of the problem was the application of the comparative-historical method. While a judge may, consciously or unconsciously, hide his real meaning as well as his motives behind a barrage of words, both his meaning and his motives become perfectly plain when looked at in the light of similar words uttered by other judges at other times in the course of our judicial history. My task was, therefore, nothing less than that of writing a constitutional history of this country—at least in outline—and of writing it, as far as possible, in the language of the actors who made it, the judges themselves.

As a preliminary, it was necessary to clear the ground of some mythical and legendary history—by writing some chapters on what might be called the *pre-natal* history of the Constitution. In doing this part of the work some special studies had to be undertaken into fields into which I could not expect the general reader to follow me. The result of these studies were taken for granted in the main text, while the proof of these assumptions was relegated into appendices, where the special student may find them, while those willing to take my conclusions on trust may skip them. The principal portion of Appendix A was published as an article in the N. Y. U. Law Review for March, 1929, under the title Lord Coke and the American Doctrine of Judicial Power. Appendix B—with some modifications—was published as an article in St. John's Law

Review for May, 1929, under the title Precedents for the Judicial Power.

But while I was willing to be taken on trust by some of my readers as to some of my assertions with regard to the pre-natal history of our Constitution, I was unwilling to do so with regard to any part of our history under the Constitution. I have, therefore, not followed the usual method of putting the proof into footnotes. To me "the proof is the thing"—so I stuck the long quotations from judicial decisions right into the text, where the reader will have to read them, if he is to read the book at all. This may deter some readers from continuing their reading, but those who read to the end will have to take nothing on trust. Incidentally, I believe that these quotations are worth reading on their own account—for much of the tragedy and comedy of our history lies hidden in them. And as one goes along the reading becomes of absorbing interest. The technical jargon and the dry rot of legal learning tend to disappear; and, instead, there stand revealed before the reader human beings—usually very interesting human beings—with their hopes, aspirations, desires, and foibles. Behind the impassive judicial masks we see impassioned actors making history, and history in the making.

New York, August, 1931.

TABLE OF CONTENTS

VOLUME I

CHAPTER	PAGE
I. THE GOVERNMENT WE LIVE UNDER	. 1
II. How About the Sheriff?	27
III. ALLEGED FOREIGN PRECEDENTS WHICH THE FRAMERS OF THE UNITED STATES CONSTITUTION MIGHT HAVE FOLLOWED	
IV. AMERICAN PRECEDENTS FOR THE JUDICIAL POWER	51
V. Experiences with Courts and the Opinions of Phi- Losophers	
VI. THE FRAMING OF THE UNITED STATES CONSTITUTION	
VII. THE FIRST DECADE OF THE CONSTITUTION	
VIII. THE VIRGINIA-KENTUCKY RESOLUTIONS	159
IX. Some More Precedents	180
X. JOHN MARSHALL AND MARBURY V. MADISON	195
XI. From the Revolution of 1800 to the War of 1812	234
XII. JOHN MARSHALL AND THE RISE OF AMERICAN NATIONAL-	
ISM	267
XIII. THE COURTS AND THE RISE OF JACKSONIAN DEMOCRACY .	317
XIV. THE IMPAIRMENT OF THE OBLIGATION OF CONTRACTS	337
XV. THE MARCH OF JACKSONIAN DEMOCRACY AND THE RETREAT	
OF THE COURTS	375
XVI. THE PERIOD OF CONFUSION	406
XVII. RIVERS V. RAILROADS	430
XVIII. THE MEANING OF THE CONSTITUTION	447
XIX. On the Eve of the Crisis	464
APPENDIX A. JUDICIAL REVIEW IN ENGLISH JURISPRU- DENCE	485
APPENDIX B. ALLEGED COLONIAL PRECEDENTS	
APPENDIX C. MORE ABOUT AMERICAN STATE PRECEDENTS	
APPENDIX D. THE INTENTIONS OF THE FRAMERS	564

CHAPTER I

THE GOVERNMENT WE LIVE UNDER

OR a century and a quarter—ever since the decision of Marbury v. Madison—the Judicial Power has been the stormcentre of American politics. Every popular, democratic, or progressive movement since that famous adjudication-which means during almost our entire existence as a nation under the Constitution—has had an anti-judicial point. Jefferson's dislike of author and decision, and his never-ceasing warnings against the federal judiciary as the "corps of sappers and miners" constantly at work undermining the Constitution, are too well-known to require recounting here. The rise of Jacksonian Democracy had a decided anti-judicial edge. In the struggle against slavery, attacks upon the courts played a prominent part, and the famous Lincoln-Douglas debates turned mainly about a court decision. In the first country-wide popular upheaval after the Civil War-the Bryan campaign of 1896—the Judicial Power was one of the two great issues bitterly contested in that memorable struggle, the great Commoner's attacks upon the Judiciary probably being considered by his supporters as well as by his opponents more important than his advocacy of the free coinage of silver. And the Judicial Power was practically the sole issue when the Hosts of the Lord met their enemies at Armageddon in 1912.

And with each battle fought the hold of the Judicial Power upon the conservative forces of the country has grown stronger. So much so, that about the time Mr. Roosevelt and his Progressives made their onslaught it was considered by the conservatives as little short of treason to question the legitimacy of that power or to criticize the manner of its exercise. The Judicial Power became the "sheet-anchor of the Constitution," and the Supreme Court, as the chief repository of that power, a sacred institution. This attitude is best illustrated by the following incident:

In the summer of 1909 there was pending in Congress a bill for an income tax. Such a law had been declared unconstitutional by

the Supreme Court in 1895. But the circumstances under which that decision was rendered were such that many people now believed that if the question were again to come before that tribunal the decision would be favorable to such legislation. Income taxes had by this time come to be regarded as part of the taxing policy of every enlightened community, and had ceased to be considered radical. Hence the introduction of the bill. But the bill was opposed by the conservatives in Congress, not on the ground that the taxes thereby provided were improper or unconstitutional, but on the ground that an attempt to bring the matter again before the Supreme Court in this fashion was irreverent, and that whatever its decision, it would result in a loss of prestige to the Court. The possible loss of prestige by the Supreme Court was considered a more serious evil than the assured loss to the Federal Government of a great and recognized power of government, and its preservation more important than the adoption by the country of a just and enlightened system of taxation. Curiously enough, this point of view was stressed mainly by the professed followers of John Marshall, whose great services to the country consisted in his solicitude for the maintenance and preservation of the powers of the Federal Government.

This attitude was expressed in the United States Senate by Mr. Elihu Root, the dean of the American Bar, then serving as United States Senator from the Empire State, after having served successively as Secretary of War and Secretary of State. On July 1st, 1909, he addressed the U. S. Senate thus:

"But, Mr. President, what is it that we propose to do with the Supreme Court? Is it the ordinary case of the suitor asking for a rehearing? No; do not let us delude ourselves about that. It is that the Congress of the United States shall deliberately pass, and the President of the United States shall sign, and that the legislative and executive departments thus conjointly shall place upon the statute book as a law a measure which the Supreme Court has declared to be unconstitutional and void. And, then, Mr. President, what are we to encounter? A campaign of oratory upon the stump, of editorials in the press, of denunciation and imputation designed to compel that great tribunal to yield to the force of the opinion of the executive and the legislative branches. If they yield, what then? Where then would be the confidence of our people in the justice of their judgment? If they refuse to yield, what then? A breach between the two parts of our government, with popular acclaim behind the popular branch, all setting against

the independence, the dignity, the respect, the sacredness of that great tribunal whose function in our system of government has made us unlike any republic that ever existed in the world, whose part in our government is the greatest contribution that America has made to political science." (Quoted by Bowman, in Congress and the Supreme Court, Political Science Quarterly, March, 1910.)

What is this unique power which is "the greatest contribution that America has made to political science," and which makes the depository of that power sacred? Also, whence comes this power which makes us "unlike any republic that ever existed," and which makes the dignity of those who exercise it of more consequence to the nation than a just and enlightened system of taxation?

The first authoritative statement of the nature of the Judicial Power was made by James Wilson, one of the framers of the Constitution, and subsequently a Justice of the United States Supreme Court. Next to Alexander Hamilton, he is the chief reliance of those who believe that this power was intended by the Framers to be, and was, included in the Constitution. In a series of lectures delivered in 1791, while a member of the Supreme Court, he twice touched upon this subject. The first time he said:

"In the United States, and in each of the commonwealths of which the union is composed, the legislative is very different from the supreme power. Instead of being uncontrollable, the legislative authority is placed, as it ought to be, under just and strict control. The effects of its extravagancies may be prevented, sometimes by the executive, sometimes by the judicial authority of the governments; sometimes even by a private citizen, and at all times by the superintending power of the people at large. These different points will afterwards receive a particular explication. At present, perhaps, this general position may be hazarded—That whoever would be obliged to obey a constitutional law, is justified in refusing to obey an unconstitutional act of the legislature—and that, when a question, even of this delicate nature, occurs, every one who is called to act, has a right to judge; he must, it is true, abide by the consequences of a wrong judgment." (James Wilson, Works, Vol. I, p. 188)

The "particular explication" appears in a passage in a subsequent lecture, and reads as follows:

"Two contradictory laws, we have seen, may flow from the same source: and we have also seen, what, in that case, is to be done. But two contradictory laws may flow likewise from different

sources, one superior to the other: what is to be done in this case? . . .

"'I know of no power,' says Sir William Blackstone, 'which can control the parliament.' His meaning is, obviously, that he knew no human power sufficient for this purpose. But the parliament may, unquestionably, be controlled by natural or revealed law, proceeding from divine authority. Is not this authority superior to anything that can be enacted by parliament? Is not this superior authority binding upon the courts of justice? When repugnant commands are delivered by two different authorities, one inferior and the other superior; which must be obeyed? When the courts of justice obey the superior authority, it cannot be said with propriety that they control the inferior one; they only declare, as is their duty to declare, that this inferior one is controlled by the other, which is superior. They do not repeal the act of parliament; they pronounce it void, because contrary to an overruling law. From that overruling law, they receive the authority to pronounce such a sentence. In this derivative view, their sentence is of obligation paramount to the act of the inferior legislative power.

"In the United States, the legislative authority is subjected to another control, beside that arising from natural and revealed law; it is subject to the control arising from the constitution. From the constitution, the legislative department, as well as every other part of government, derives its power; by the constitution, the legislative, as well as every other department, must be directed; of the constitution, no alteration by the legislature can be made or authorized. In our system of jurisprudence, these positions appear to be incontrovertible. The constitution is the supreme law of the land: to that supreme law every other law must be

inferior and subordinate.

"Now, let us suppose, that the legislature should pass an act, manifestly repugnant to some part of the constitution; and that the operation and validity of both should come regularly in question before a court, forming a portion of the judicial department. In that department, 'the judicial power of the United States is vested' by the 'people,' who 'ordained and established' the constitution. The business and the design of the judicial power is, to administer justice according to the law of the land. According to two contradictory rules, justice, in the nature of things, cannot possibly be administered. One of them must, of necessity, give place to the other. Both, according to our supposition, come regularly before the court, for its decision on their operation and validity. It is the right and it is the duty of the court to decide upon them: its decision must be made, for justice must be administered according to the law of the land. When the question occurs -What is the law of the land? it must also decide this question.

In what manner is this question to be decided? The answer seems to be a very easy one. The supreme power of the United States has given one rule: a subordinate power in the United States has given a contradictory rule: the former is the law of the land: as a necessary consequence, the latter is void and has no operation.

"In this manner it is the right and it is the duty of a court of

justice, under the constitution of the United States, to decide.

"This is the necessary result of the distribution of power, made, by the constitution, between the legislative and the judicial departments. The same constitution is the supreme law to both. If that constitution be infringed by one, it is no reason that the infringement should be abetted, though it is a strong reason that it should be discountenanced and declared void by the other." (James Wilson, Works, Vol. I, p. 414 et seq.)

Chief Justice Marshall, in his famous opinion in Marbury v. Madison, followed closely the reasoning of Justice Wilson, as may be seen from the following passage in the opinion which is the foundation of the Judicial Power:

"The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

"That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental, And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

"This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended

by those departments.

"The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed,

are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an or-

dinary act.

"Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

"If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter be true, then written constitutions are absurd attempts, on the part of the

people, to limit a power in its own nature illimitable.

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

"This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be

lost sight of in further consideration of this subject.

"If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the

operation of each.

"So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

"If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to

which they both apply.

"Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on

the constitution, and see only the law.

"This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, not-withstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

"That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour

of its rejection.

"The judicial power of the United States is extended to all

cases arising under the constitution.

"Could it be the intention of those who gave this power, to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

"This is too extravagant to be maintained.

"In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

"There are many other parts of the constitution which serve to

illustrate this subject.

"It is declared that 'no tax or duty shall be laid on articles exported from any state.' Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law?

"The constitution declares 'that no bill of attainder or ex post

facto law shall be passed.'

"If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavours to preserve?" (Marbury v. Madison, 1 Cranch 137, 176-179)

This argument seems not only logical, but really very simple, as Chief Justice Marshall assures us. Unfortunately, neither life in general, nor the growth of political institutions in particular, is

governed by logic. And what to one mind may seem perfectly simple, may to another appear beset with insurmountable difficulties. Particularly, what may seem perfectly simple in one generation, may appear to be exactly the reverse in another generation. As a matter of fact, like all purely logical deductions, the thesis contended for by Justice Wilson and Chief Justice Marshall is very far from simple, as will be seen upon closer examination of the subject further below. But more important than any flaw that can be found in these learned Justices' reasoning, is the treatment which it received from history. And history—that is to say, the actual experience of mankind since those statements have been put down by the eminent jurists—has been very unkind to the legalistic argument. This is particularly true of Mr. Justice Marshall's formulation of the argument, which has been refuted on every page of history dealing with this subject since Marshall delivered his famous opinion.

It will be noted, first of all, that, according to Marshall, the right of the judiciary to declare acts of the legislature void and

unconstitutional is inherent in every written constitution.

"Certainly,—says Marshall—all those who have framed written constitutions contemplated them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

"This theory is essentially attached to a written constitution, and is consequently, to be considered, by this court, as one of the

fundamental principles of our society."

At the time the great Chief Justice penned these famous words, mankind had had very little experience with written constitutions. When the United States Constitution was adopted there were no other written constitutions in existence outside of our own state constitutions. This situation had changed somewhat, but not very materially, at the time the great Chief Justice wrote his opinion in *Marbury v. Madison*. But since then the world went on a written-constitution basis, so to say, so that now there is practically no civilized country in the world, with the notable exception of Great Britain, which has no written constitution. The number of written constitutions now in existence is legion. And practically each and every one of these written constitutions is a refutation of Marshall's basic assertion,—the assertion which

he considered, according to his own words, "as one of the fundamental principles of our society." For under none of those numerous constitutions has the judiciary department the power to declare unconstitutional a legislative act of its own government as in contravention of its own constitution.

As a consequence of this ruinous effect of the march of history upon Marshall's logic, the supporters of the Judicial Power find themselves compelled to look for other arguments with which to buttress, or to provide a substitute for, the great Chief Justice's logic. But there is another reason why the modern upholders of the Judicial Power should look for older and better reasons for the support of that power than the legal logic of Wilson and Marshall. And that is the all-important fact that the Judicial Power today is not the Judicial Power asserted by Wilson and Marshall. It is a far cry from the Judicial Power based upon the separation of powers of government into three co-equal departments, which was asserted and defended by Wilson and Marshall, and the Judicial Power as we know it today, and as asserted and defended by their modern successors. The new Judicial Power was thus explained by Simeon E. Baldwin, one time professor of constitutional law at Yale University, Chief Justice of the State of Connecticut, and Governor of that State, and near-contender for the presidency of the United States:

"No government can live and flourish without having as part of its system of administration of civil affairs some permanent human force, invested with acknowledged and supreme authority, and always in a position to exercise it promptly and efficiently, in case of need, on any proper call. It must be permanent in its character. Only what is permanent will have the confidence of the people. It must always be ready to act on the instant. The unexpected is continually happening, and it is emergencies that put governments to the test. The judiciary holds this position in the United States."

This new exposition of the Judicial Power was first made by Judge Baldwin in 1905, the foregoing quotation being the opening paragraph of his well-known work published in that year under the title *The American Judiciary*. In 1914 it was adopted by Professor Charles G. Haines, who uses it in the opening paragraph of his book *The American Doctrine of Judicial Supremacy*, and who adds on his own account:

"In the United States supreme power is exercised for most purposes through a judicial system in contradistinction to those governments in which the legislature is supreme and the courts subordinate. . . .

"With the few exceptions noted the United States stands alone among the great countries in the world according the judiciary, the function of guarding the fundamental law and in establishing thereby judicial supremacy. . . .

"This principle of law and political practice which places the guardianship of written constitutions primarily in courts of justice, combined with the Anglo-Saxon idea of the dominance of judge-made law, constitute the basis of what may appropriately be termed the American doctrine of judicial supremacy."

Not only is the Judicial Power here described an entirely different governmental institution from the Judicial Power envisaged by James Wilson and John Marshall, but it rests upon an entirely different governmental theory. The Judicial Power as understood by Wilson and Marshall was based on the theory of the separation of powers—the distribution of the powers of government among three co-equal departments; while the modern Judicial Power as expounded by Baldwin and Haines, and as actually exercised by our Judiciary, is based on the theory of the centralization of the powers of government in the Judiciary, which is thereby made the supreme political power in the nation.

And the theory of the separation of powers is not the only one abandoned by the modern supporters of the Judicial Power. There is a tendency also to abandon the written basis of the power and to substitute for it a sort of Judicial Prerogative, claimed to be inherent in the office itself, independent of any written constitution either as a source or measure of the power. According to this theory, the judiciary is the repository of a higher law, of which the conscience of the judge is the only evidence and sole measure, which requires and enables him to declare "unconstitutional," and therefore null and void, any law which conflicts with that higher law as understood by him.

This new development in our constitutional law is based upon two historical theories, one appertaining to England, and one to the United States. In so far as England is concerned this historical theory consists in the assertion that English judges claimed, and for a long time possessed, the power to declare a law null and void for "unreasonableness," or because it did not square with the dictates of equity and justice as understood by the judges. The American exponents of this supposedly English constitutional theory claim Lord Coke as its chief sponsor in that country. And as a warrant for its incorporation into American constitutional law, it is supplemented by a rather novel, not to say startling, theory of the American Revolution. It is nothing less than the assertion that the American Revolution was but a lawyers' revolution, designed to revive and perpetuate in America Lord Coke's doctrine of Judicial Power, which seems to have fallen upon evil days in England just about that time.

As may be surmised, the principal exponents of this novel theory of the American Revolution are lawyers. It first took definite form in the report of a special committee appointed by the New York State Bar Association to investigate our subject. The New York State Bar Association is the greatest body of lawyers in this country, and comprises in its membership most of our great constitutional lawyers. This special committee naturally consisted of very eminent and very learned lawyers, as befitted the organization which it represented and the importance of the subject which it was to investigate. The committee's labors were long and arduous, and its report detailed and exhaustive. It was delivered in three sections—to three annual conventions of the Association, held, respectively, in the years 1915, 1916 and 1917. Needless to say, it finds the Judicial Power well-founded upon legal, logical, and historical grounds. We shall have occasion to advert again to this report, and to discuss some of its assertions in detail. Here we shall refer only to its main thesis, announced in the beginning of its first section and adhered to throughout—the lawyers' theory of the American Revolution. This theory is thus stated on page 11 of this committee's report for 1915:

"In short the American Revolution was a lawyers' revolution to enforce Lord Coke's theory of the invalidity of Acts of Parliament in derogation of common right and of the rights of Englishmen."

And on page 15 of the same report the committee reiterates this assertion in the following language:

"The American Revolution was a Lawyers' Revolution to enforce the principle laid down in Lord Coke's, Lord Hobart's, and Lord Holt's decisions that acts of parliament against common right or in violation of the natural liberties of Englishmen were void."

The thing to be remembered is that in Lord Coke's theory—whatever it was—neither the source of the judicial power nor its measure was based on any written constitution. The power was inherent in the office, and in its nature superior to the legislature. The overriding of the will of the legislature was not done ex necessitate, because of the compelling force of a written constitution superior to both legislature and judge, but by the requirements of right and justice as dictated to the judge by his conscience.

One thing is clear from a comparison of the arguments of the original exponents of the Judicial Power and their modern followers: Whatever the arguments whereby it is supported, the thing itself has undergone such radical change in the course of our history that it would probably not be recognized either by its original advocates or by the great Chief Justice who is supposed to have been its actual founder.

It will be necessary, therefore, not only to re-examine the various arguments adduced in support of the Judicial Power, but also to follow its growth historically from the time of its birth, when the judiciary was very properly described as the weakest of the governmental departments, to our own days of avowed Judicial Supremacy, when one of its great exponents frankly describes it as that part of our governmental system which is "invested with acknowledged and supreme authority," and when the government of our country may be properly called a "Government by Judiciary."

Before proceeding, however, to an examination of the historic development of the Judicial Power from its comparatively small beginnings to its present commanding position, we shall discuss here two cases as illustrative of the intricacy of the subject and of its real meaning in the life of our nation. These cases will show, on the one hand, that even in its simple form, the thing is not quite so simple as it might seem to the uninitiated who may read Marshall's logical exposition, and as it may have seemed to Marshall himself—at least, not so simple in practice as it may seem in theory. And, on the other hand, these cases will illustrate the difference between the right of a judge to obey the written dictates of the Constitution in preference to a legislative act, modestly asked for by Wilson and Marshall, and the great gov-

ernmental agency pervading and controlling every department of our life which that modest power has since become.

The two cases in question are connected with two epochal events in the history of the Judicial Power and of its literature. One is the famous Legal Tender case, or series of cases. The Legal Tender decisions are one of the greatest events in the history of the Judicial Power in this country, as well as in the history of the country itself. In addition, the last of them is the starting point of the modern literature of our subject. The second case was of no such importance either in the history of the Judicial Power or in the life of the country; in fact, it was of no consequence whatever in either, so that its name is probably unfamiliar to all but a few of the closest students of the subject. But it was lifted from obscurity by the committee of the New York Bar Association appointed to consider our subject, to which we have already alluded. It also deserves attention in itself, for it is admirably suited for the purpose of illustrating the point we have in mind, which is, that when a lawyer speaks of two written texts as contradicting one another, it does not necessarily mean that they actually contradict each other in the ordinary sense in which laymen understand the word "contradict." What it usually means is, that an astute logician, particularly if he is given to medieval, scholastic reasoning, may find a contradiction between them. We do not mean to say that it always means just that, but only that it frequently means only that and nothing more. Therefore, when the judiciary is given the power to declare a law unconstitutional whenever the judges think that the law is repugnant to the constitution, it actually means that the judiciary is given the power to declare null and void any law, important or unimportant, whenever the particular judges who have the last say in the matter, or a majority of them, may find, by some scholastic method of abstruse legalistic logic, that the law is not in consonance with the constitution. On the other hand, the better known case will illustrate the fact that what is sometimes called by the judges a contradiction between an act of the legislature and the constitution, means in reality a contradiction between the law in question and what ought to be in a good constitution—that is to say, in a constitution embodying the particular political, social, and economic beliefs of the judges deciding the case.

We shall begin with a consideration of the less famous case.

In a separate concurring memorandum prepared by Mr. Everett V. Abbot, one of the members of the Special Committee of the New York State Bar Association, included in the first section of its report (the other members of the committee agreeing), Mr. Abbot undertakes to illustrate the subject under consideration by a discussion of the case of Lewkowicz v. Queen Aeroplane Co., decided by the New York Court of Appeals in 1913, and reported in 207 N.Y. 290. The principal part of this Memorandum is as follows:

"By the constitution of this State, adopted by direct vote of the people in 1894, the jurisdiction of the City Court of the city of New York was limited to the sum of \$2,000. That is to say, the court was not authorized to render a money judgment for more than that amount, exclusive of interest and costs.

"In response to a considerable popular demand, the legislature of this State by Laws 1911, chapter 569, enacted that the jurisdiction of the court should be enlarged to the sum of \$5,000.

"The Court of Appeals in the case cited, held that a judgment

for \$4,316, or more than \$2,000 interest and costs, was void.

"On this state of facts four questions arise. The first is as follows:

"1. Which of these two written enactments, the constitution or the statute, represents the will of the people?

"The constitutional enactment was adopted by a direct vote of the people. It was contained in an instrument which prescribed that the only method of modifying it was by another direct vote of the people. The same instrument established the legislature of the State and conferred upon it certain powers of a legislative character, but it conferred no power to amend or repeal the instrument itself. The real will of the people was, therefore, that the jurisdiction of the City Court should be limited to \$2,000, and that it should not be enlarged beyond that sum save by their personal will again to be manifested by their personal ballots. Consequently, when the legislature undertook to enlarge the jurisdiction of the court by statutory enactment, it was flying in the face of the only authentic expression of the people's will which was then extant. Notwithstanding any change which might have taken place in popular sentiment, the time had not then come when the people wished their new views to be made effective by any other agency than their own votes.

"We have now made a long step forward in understanding our subject. We have learned that in each case in which the constitutionality of a statute is involved, it is the constitution, and not the statute, which represents the will of the people, and that when a court finds a statute unconstitutional, that is, in conflict with the constitution, it is in reality following the people's will, not defying it; enforcing the people's will and not aiding it to be defeated.

"The next question is this:

"2. If the constitution was the only authentic expression of the will of the people, what was the effect of the statute?

"This question almost answers itself. The legislature of the State of New York was not vested with power to alter the constitution in any particular. That function the people reserved to themselves, and they declared that it could not be exercised save by their own direct vote. Any attempt therefore by the legislature to repeal or amend the constitution in any particular would be futile. It would have no effect. It would be a blow in the air. It would not be the law, and could never attain the status of a law. When, therefore, the legislature assumed to confer upon the City Court a jurisdiction which was denied to that court by the constitution, its enactment was unavailing. It did not confer an enlarged jurisdiction. Before the statute was enacted, and after the statute was enacted, the jurisdiction remained fixed at the sum of \$2,000. In technical language, the statute was a nullity, and the City Court never acquired jurisdiction to enter a judgment in excess of \$2,000.

"We are all too prone to forget that in our country the legislature is a body of strictly limited powers. Its jurisdiction is narrowly circumscribed by the written constitutions which are in force in the several States and in the Union as a whole. When, therefore, a legislature attempts to act in excess of its powers, it does not have the authority of the people behind it. It does not express their will, and its act is not the authoritative act of their agent. If the time shall ever come when our people shall repose unlimited confidence in any legislature, and shall wish to confer upon it the power to repeal or modify their own direct enactments, it will be possible for the people to carry out their wish; but they can only do so by removing limitations which they themselves have imposed. They must set the legislature free by such constitutional provisions as have never yet been adopted or even conceived.

"The third question is this:

"3. Assuming that the statute did not repeal the constitution, what must a court do in a case in which the statute is involved?

"The people of the State of New York have said that a judgment of the City Court of the City of New York in excess of \$2,000 shall not be valid. The legislature of the State of New York, acting in excess of its powers, has said that such a judgment shall

be valid. We have seen that this declaration by the legislature was of no effect. It did not enlarge the jurisdiction of the court, and any judgment which has no warrant except that statute is necessarily void. Such a judgment will afford protection to nobody who acts under it. If, for example, the sheriff should undertake to levy on the defendant's property in an effort to satisfy it, he would be liable for trespass. His only warrant of authority for taking the defendant's property would be the judgment, and the execution issued under it, and they would be null and void. So, too, if a suit were brought on the judgment in a foreign state, for example, in the State of New Jersey or in England, and the defendant should by proper plea dispute its validity, the foreign court would be necessarily constrained to acknowledge that it was null and void because entered without jurisdiction, and, therefore, it would refuse to allow it any validity in the foreign territory.

"This duty to regard the judgment as invalid would not be confined to the sheriff or to the foreign court. It would extend to every person to whom the question should be presented. When, therefore, the Court of Appeals of the State of New York on a direct appeal from such a judgment was confronted with the question whether the judgment was valid, it had no choice. A decision that the judgment was valid would involve an adjudication that the legislature of the State of New York has the power to repeal a constitution which the people of that State have adopted by their direct vote and which they have further declared shall not be repealed save by another direct vote. The court could not render such a decision without violating its judicial oath. Its clear duty, therefore, was to declare the invalidity of the judgment of the

City Court.

"We now come to the fourth and last question:

"4. What was the effect on the statute itself of an adjudication that the jurisdiction of the City Court had not been enlarged, and that a judgment for \$4,316 was void as entered without jurisdiction?

"It is in the answer to this question that most of the confusion which now surrounds the question referred to this committee has

taken its origin.

"There has been a confused notion that a court in adjudging that a statute is unconstitutional somehow interferes with the powers of a co-ordinate branch of the government, and exercises a nullifying influence upon its acts. This is utterly erroneous. The court does nothing of the kind. It does not veto the enactment. It does not annul the statute. It does not take away any validity or quality that the statute may possess. It does not usurp any function which does not belong to it. It does not exercise any power that is not judicial. In the routine course of business the

Court of Appeals was confronted with the question whether or not a judgment of the City Court was within its jurisdiction. In the fulfillment of its duty, it found that the inquiry was carried back to the ulterior question whether the legislature could repeal the constitution and could confer a jurisdiction which the constitution denied. In announcing a negative answer to this question, the court did no affirmative act. It merely refused to recognize validity in a statute which never had validity. It no more annulled or vetoed an act of the legislature than in the ordinary case it revokes or restricts the authority of an agent when it adjudges that he has acted without authority.

"Now we can see the fundamental misconception which underlies the views of those who are disturbed because a court declares that a statute is unconstitutional. They think that the court has exercised some mysterious function which is not confided to it and which invades the function of another branch of the government. The view is radically erroneous. The man who can, even by inadvertence, use such a phrase as 'the veto power of the court,' 'judicial annulment of legislative acts,' 'judicial power over statutes,' 'judicial control of the legislature,' convicts himself of ignorance of the rudimentary principles of the matter under discussion. He had not learned even the alphabet of the language

which he uses.

"The principle is simple: When a legislature has exceeded its powers, its act has never attained the status of a law. The court in declaring the unconstitutionality of such an act has merely refrained from fictitiously giving it a validity which it never possessed and which the people have denied. The court has done nothing to the act itself."

We have quoted Mr. Abbot's Memorandum at this length because we believe it to be the most perfect modern instance of a naïve repetition of Marshall's original simple argument. Only one question can arise after reading Mr. Abbot's Memorandum, namely: How is it that the legislature of the State of New York could have passed a law enlarging the jurisdiction of the City Court to \$5,000 when the State Constitution expressly limited this jurisdiction to the sum of \$2,000? To say that was done "in response to a considerable popular demand" does not seem to meet the situation. In the first place, why should there be a "considerable popular demand" that the legislature should override the constitution, since the matter would seem to be rather unimportant and one in which few except lawyers were likely to be interested. And if, for some mysterious reason, there should

be such a popular demand, why should the legislature, consisting mostly of lawyers, have succumbed to it? And further reflection makes this action on the part of people and legislature even more inexplicable. The Constitution of the State of New York, unlike the United States Constitution, is easily amendable, and amendments to it are submitted almost regularly at every election on all kinds of topics, important and unimportant. The legislature could, therefore, have easily satisfied the "considerable popular demand" by submitting the matter as a constitutional amendment in the usual course of business.

And the puzzle becomes even more puzzling after we add something to the statement of facts contained in Mr. Abbot's Memorandum. The statement of facts was simplified by Mr. Abbot by leaving out some data which evidently seemed immaterial to him, but which we consider rather important. One of these is the fact that the law had been held constitutional by the Judge of the City Court before whom it first came up for consideration, and also by the Appellate Term of the Supreme Court, consisting of three judges, before whom the question came up on appeal. Whatever may be said of the members of the legislature as to their likelihood to succumb to "popular demand," surely no such imputation could be made against the judiciary; for if it could, then our whole structure of constitutional limitations would be toppling over like a house of cards.

It should be added, in this connection, that at least two of the judges who wrote opinions in favor of the constitutionality of this law were eminent jurists. One of them was Mr. Justice Samuel Seabury, afterward himself a member of the Court of Appeals which ultimately held this law to be unconstitutional; and another was Mr. Justice Irving Lehman, now a member of that same Court of Appeals. It may also be noted, in passing, that Mr. Justice Samuel Seabury is somewhat of a specialist on the subject of the City Court, having written a very learned work about that court, of which he was himself at one time a member. The principal opinion upholding the constitutionality of the law in question, written by Justice Seabury, is a very learned and exhaustive essay on the subject. How is it—one must ask—that these learned Justices overlooked the provision of the Constitution limiting the jurisdiction of the City Court to \$2,000?

We need not enter here upon a discussion of the subject itself,

i.e., whether Mr. Justice Seabury and his associates were right in holding the law constitutional, or the Court of Appeals in holding it unconstitutional; although we do not at all mind saying that, for ourselves, we believe that Mr. Justice Seabury had the better of the argument. But that is beside the point. For the purpose of this discussion we are quite willing to assume that Mr. Justice Seabury was wrong and the Court of Appeals right. The real question is: How could there be a difference of opinion on the subject at all?

From Mr. Abbot's statement of facts, at least, one is obliged to assume that there is no room for any difference of opinion, or anything to argue about. The answer is: That in discussing this subject, one need not take such statements as "the constitution says" or "the constitution provides" too literally. What it actually means is that in the opinion of the writer, usually arrived at after a long and involved process of technical reasoning, or sentimental declamation, as the case may be, a phrase of the constitution was found to contain, or was tortured into containing, what the writer started out to find in the constitution. By this time, the reader has probably guessed that there is no such express provision in the New York State Constitution as Mr. Abbot's opening statement of facts would lead an uninitiated layman to assume. The Constitution of the State of New York does not say, in so many words, "The jurisdiction of the City Court of the City of New York is limited to \$2,000."

We need not inquire further as to the exact tenor of the constitutional provision in question. Suffice it to say that the Legislature of the State of New York, which probably consulted some eminent constitutional lawyers before passing the law in question, thought that there was nothing contradictory between the provisions of the Constitution and the enactment in question. That does not mean that other eminent lawyers could not argue the other way. We know that ultimately very learned essays were written on both sides of the question. Nor do we need to speculate as to what might have been the result on the constitutionality of the law in question if Judges Seabury and Lehman had been members of the Court of Appeals instead of the Appellate Term when this momentous subject was up for decision.

The moral of this case is the same whatever our guess may be on the last subject, and whatever our opinion may be as to which

court decided correctly the famous case of Lewkowicz v. Queen Aeroplane Co. And that moral is: That legislatures do not usually pass laws which fly in the face of the constitution, and that when a legislature passes a law there is at least room for argument as to whether or not it is constitutional, so that honest men may honestly differ about it. Also, that giving judges the power to pass upon the constitutionality of legislation does not necessarily protect us against unconstitutional laws. And it may suggest at least the possibility, under our system, of law being declared unconstitutional which are not really so.

The last point is brought out strikingly in the Legal Tender Cases. In February, 1862, in the midst of the Civil War, Congress passed a Legal Tender Act which made irredeemable paper money legal tender for all debts. The act was passed after considerable agitation in the country and long debates in Congress, in which the opinions, pro and con, moral, political, and economic, were thoroughly canvassed and duly considered. It was passed on the recommendation of that great jurist and statesman, Salmon P. Chase, then Secretary of the Treasury and afterward Chief Justice of the United States, who considered the measure wise, just, and presumably constitutional.¹

In February, 1870, after the law had been in operation for eight years and its constitutionality upheld by every State Court but one,² the United Supreme Court declared this law unconstitutional by a divided court, Mr. Salmon P. Chase, as Chief Justice of the United States, writing the prevailing opinion. The minority of the court wrote vigorous dissenting opinions. At the time of the decision the court consisted of seven members, four of whom

² Justice Miller, in his dissenting opinion in *Hepburn v. Griswold*, said: "Fifteen state courts, being all but one that has passed upon the question, have expressed their belief in the constitutionality of these laws."

There has been some question as to what was Chase's original position on the constitutionality of the legal tender legislation. It seems to us that there can be no doubt of the fact that, whatever misgivings Chase may have had as to the advisability of the issuance of legal tender notes except in a case of extreme necessity, he could not possibly have doubted the constitutionality of the legislation actually recommended by him. Aside from the extreme improbability of a man of Chase's type recommending unconstitutional legislation, it must be remembered that the question of constitutionality hinged on the question of necessity, and Chase's final recommendation of the legislation was due to the fact that he had become convinced of its necessity. Mr. Justice Strong, speaking for the Court in the Legal Tender Cases, said: "Even the head of the Treasury represented to Congress the necessity of making the new issues legal tenders, or, rather, declared it impossible to avoid the necessity."

constituted the majority declaring the law unconstitutional. There were two vacancies in the court at that time, and on the day when this decision was announced the President filled the two vacancies by appointing two new judges. It so happened that, technically, the decision rendered applied only to debts contracted before the passage of the law, although the reasoning of the court was broad enough to include all debts; and it was commonly believed by the profession and the country that the opinion written by Chief Justice Chase settled the question of the constitutionality of the law both as to pre-existing debts as well as to debts incurred after the passage of the law. After considerable manoeuvring which need not be gone into here, the subject obtained a new hearing fifteen months later, with the result that the court reversed its first decision and upheld the constitutionality of the law both as to pre-existing as well as after-incurred debts. The decision this time was by a majority of five to four, the minority consisting of the four judges who constituted the original majority; while the new majority consisted of the three judges who constituted the original minority plus the two new judges. These cases will be considered at considerable length further below. Here we shall only remark the following:

The Constitution, as is usually the case when the constitutionality of a law is called into question, is silent on the subject in so far as its express provisions are concerned. Both sides, therefore, argued by a process of deduction. So far the famous Legal Tender case was like the obscure Lewkowicz case. But the Legal Tender case involved really momentous questions. And the arguments, while seemingly technical, were in reality of a quite different character, in that the upholders as well as the opponents of the constitutionality of the law argued not from dry texts and legal erudition but frankly from political and economic considerations. The upholders of the law considered it wise, just, and, above all, absolutely necessary for the preservation of the very existence of the nation in war time. On the other hand, the opponents of the law held it to be not only unwise and unjust, but also utterly unnecessary for the successful conduct of war. In short, they thought it an utterly worthless and even harmful law both in peace and war. And both sides were quite convinced that the Constitution was on their side. Their respective dissertations on the subject are interesting examples of what lawyers and judges

mean when they say that a law is either constitutional or unconstitutional, when they speak in terms of living reality instead of legalistic jargon.

But the controversy did not end there. Fourteen years after the original decision of the Supreme Court holding the wartime Legal Tender Act unconstitutional on the ground that even the urgency of war does not give Congress the power to pass such a law, the same Supreme Court decided that Legal Tender laws are constitutional not only as war measures but even in times of peace. In the meantime the court had undergone some more changes in personnel. Chief Justice Chase was gone, and so were Judges Nelson and Clifford; so that of the former majority of the court who declared the Legal Tender Act unconstitutional Judge Field alone remained on the Bench, and he wrote a very vigorous dissenting opinion, protesting against the decision of the court which now held that Congress had the right to do in times of peace something which it had fourteen years ago held could not be done even as a war measure.

The following lessons may be drawn from this preliminary examination of the Legal Tender Cases:

First: Honest men will honestly differ as to what is wise, just, or expedient, in public measures.

Second: In a government like ours, in which the judges possess the power to declare laws null and void for alleged repugnance to the constitution, every judge tries to read into the constitution his notions of what is wise, just, or expedient.

Third: In passing upon the constitutionality of a law our judges interpret the constitution in the light of their notions of what is wise, just, necessary, or expedient; and declare unconstitutional what they consider unwise, or unjust, or inexpedient,—being guided almost exclusively by their philosophic, political, social, and economic beliefs, and little or not at all by constitutional texts.

Fourth: Under our system, which gives the judiciary power to declare laws unconstitutional, important laws which are constitutional under our own established mode of testing the subject may be declared to be unconstitutional by the judges and there is no redress. If it had not been for the chance of the change of personnel at the very time that the original decision on the Legal Tender Act was rendered, that decision would still be law today,

and would have inflicted upon the country the untold woes which the original minority foretold would be the result of that unfortunate decision.

Fifth: Giving the judiciary power to declare legislation unconstitutional does not protect us against unconstitutional legislation. For if Mr. Chief Justice Chase and Associate Justices Nelson and Clifford and Field be believed, we have been living under unconstitutional legal tender laws ever since the passage of the original Legal Tender Act in 1862, with the brief interval of fifteen months which elapsed between the first and second legal tender decisions.

That the Legal Tender Acts under which we have been unfortunately living now for some sixty-five years were absolutely unconstitutional as well as unwise, unjust, and oppressive, has been asserted not only by the great judges who constituted the majority of the United States Supreme Court in the first Legal Tender case, but also by other wise and great men. For the ghost of those acts will not down; and there are some learned constitutional lawyers who still believe that those acts were unconstitutional—even though officially, we must, as good patriots, consider them constitutional.

And it is interesting to note in this connection that it was the decision in the last of the Legal Tender cases that gave rise to the early works making the beginning of the modern literature on the subject of the Judicial Power. It happened in this way: After the decision in the last of these cases (Juilliard v. Greenman, 110 U.S. 421) was rendered in 1884, declaring legal tender laws constitutional both in peace and war, George Bancroft, the great historian of the United States, as well as of the Constitution of the United States, wrote a pamphlet under the title The Constitution Wounded in the House of Its Guardians, in which he roundly scored that august tribunal for its decision, and predicted untold evils to the country and to our institutions as the result of the complicity of the judiciary in foisting upon the country this dishonest, oppressive, and unconstitutional legislation. Mr. Richard C. McMurtrie, a famous lawyer of that day, replied in a pamphlet entitled A Plea for the Supreme Court: Observations on Mr. George Bancroft's Plea for the Constitution, in which he defended the United States Supreme Court against the great historian's attacks. In his defense of the Supreme Court in its

final decision on the legal tender question, Mr. McMurtrie declared himself whole-heartedly in favor of the right of the judiciary to declare laws unconstitutional, but defended this right in a manner which seriously threatened that power as it was then beginning to shape itself. Briefly stated, his thesis was this: The power of the Federal Judiciary to declare laws unconstitutional is not given expressly in the United States Constitution. It is based upon logical deduction or inference from the whole system of government provided for by that instrument. In other words, it is what lawyers call an "implied power." But if the entire Judicial Power can be based upon a mere implication, then other vast powers may have been granted by the Constitution in the same manner; and there is no valid reason for assuming that the judiciary is the only one to whom great powers have been granted by implication. If, therefore, Marshall and his followers were correct in exercising the right to declare legislation unconstitutional, Congress should have the right to enact all such laws as it may reasonably find implied in the powers granted to the legislative department by the Constitution. In the course of his Observations Mr. McMurtrie said:

"Let me ask, whence is derived this power that we are now discussing, that of declaring void a legislative act? . . . Is there any such grant in the constitution, or any allusion to it? Since C. J. Marshall's judgment in Marbury v. Madison, I should have said, but for the facts contradicting me, that no one probably has been able to question that the power does not exist, and that it was created by the constitution. But it is a mere deduction of logic. Impossible (to my apprehension) for a sane mind to question, but still derived by tacit implication, a process which one of the most conspicuous members of the Convention assured the most important of the communities that enacted the instrument, could not be a ground for asserting a grant. . . .

"It is certainly true that before the adoption of the constitution Mr. Hamilton asserted this power was placed with the Court, but he limited it to the determination of the extent of the powers granted by the instrument; and if the makers of that instrument really foresaw what they were doing, and the consequences involved, and yet left such questions to be determined as they have done, with no provision for what might occur while the legislation was undisputed, anything more unfinished than their work can be scarcely mentioned. But intended or not, is it

not a power that is to be ascertained to exist by reasoning and reasoning only? Why is the judiciary the only branch of government, whose views as to the powers they possess by the grant, are to be regarded? If this be not implication and inference, and the exact converse of an express grant, I am at a loss for a meaning to these words.

"Therefore it seems to me plain that as it has been demonstrated for seventy years, and acquiesced in by all, that one of the most important functions of the government, nothing less than a control over legislatures, executives and the sovereignties which formed the United States, has been created and lodged by inference, and by inference only, in one branch of that government, uncontrollable by the united powers of the imperial state and of the states which constituted the imperium, and this has been done without any reference to the subject in the constitution, and probably as to one branch of the subject (the right to determine the illegality of state legislation), without any person concerned in the matter, seeing that it had been done, is it impossible that other high powers may be found to have been similarly granted?"

This certainly did not fit in with the new conception of the Judicial Power which the Supreme Court had unsuccessfully attempted to exercise in the Legal Tender cases, and which it did successfully exercise in the Civil Rights cases, and which was destined to make it that "supreme authority" in the United States Government of which Judge Baldwin speaks, and which it undoubtedly is today. It was therefore up to the advocates of that power to abandon Marshall's logic as their main reliance, and to look elsewhere for new foundations for the new Judicial Power. In response to this urgent demand for new props for the Judicial Power, Mr. Brinton Coxe, a noted lawyer and scholar, undertook to prove that Mr. McMurtrie was wrong in asserting that the Judicial Power rested merely on inference, and to demonstrate the existence of an express grant of that power in the United States Constitution, notwithstanding the fact that neither Marshall nor any of his successors had ever claimed any such express grant. Unfortunately, Mr. Coxe did not live long enough to write his treatise, which was to be entitled An Essay on Judicial Power and Unconstitutional Legislation but he did write what he called an Historical Introduction to the contemplated work. This was published posthumously (Philadelphia, 1893) under the above

title. Historical Introduction is in itself a substantial volume; and it is, to our mind, the only work of genuine scholarship produced by the supporters of the Judicial Power. We shall have occasion to discuss it at considerable length in the following pages. In the meantime we must turn our attention to another problem.

CHAPTER II

HOW ABOUT THE SHERIFF?

UR readers will remember Mr. Everett V. Abbot's reference to the sheriff in his Concurring Memorandum. Mr. Abbot's contention, our readers will recall, is, that an unconstitutional act is an absolute nullity. He therefore worries as to what would happen to the sheriff who should act under a judgment of a court attempting to enforce an unconstitutional law. This question of the sheriff is interesting for a number of reasons; although we believe that Mr. Abbot has somewhat misconceived the sheriff's exact position in this situation. Let us see the way Mr. Abbot puts it:

"Such a judgment"—that is, a judgment like that of the City Court in excess of the \$2,000, given in pursuance to the act of the legislature giving the City Court the power to give judgments up to \$5,000—"will afford protection to nobody who acts under it. If, for example, the sheriff should undertake to levy on the defendant's property in an effort to satisfy it, he would be liable for trespass. The only warrant or authority for taking the defendant's property would be the judgment and the execution issued under it, and that would be null and void. So, too, if a suit were brought on the judgment in a foreign state, for example, in the State of New Jersey, or in England, and the defendant should by proper plea dispute its validity, the foreign court would be necessarily constrained to acknowledge that it was null and void because entered without jurisdiction, and therefore, it would refuse to allow it any validity in the foreign territory. This duty to regard the judgment as invalid would not be confined to the sheriff or to the foreign court. It would extend to every person to whom the question should be presented."

Our readers will note the resemblance of this statement to the language used by Associate Justice Wilson in his lectures quoted above, except that portion of it which relates to foreign courts.

Let us assume that that is so, since this statement is issued under the authority of the greatest body of lawyers in this country,

and let us pursue the subject a little further. If it be true that the question of constitutionality is up to the sheriff, to foreign courts, and to every person to whom the question is presented, we seem to be in a terrible mess.

If it be true that the sheriff who executed the judgment of the City Court in the Lewkowicz case exposed himself to an action in trespass, and that anybody else who acted under it exposed himself to some kind of action in a foreign court, as Mr. Abbot assures us, what of the poor sheriff today?

As we have seen, the question of the constitutionality of the law involved in the Lewkowicz case was not a simple one at all. and not very easy for an ordinary sheriff to determine. Great jurists have disputed about it, and there is some doubt as to whether the Court of Appeals as now constituted would decide it in the same way in which it was decided in 1913 if the question were still an open one. Assuming, however, that the Court of Appeals would do today what it did then, that is not a sufficient protection for the poor sheriff. The New York Court of Appeals has been known to be wrong on the subject of the constitutionality. One of the most famous cases in the entire domain of our constitutional law, the case of Gibbons v. Ogden, was a case in which the highest New York State Court declared a law constitutional, and the United States Supreme Court, in one of Judge Marshall's most famous decisions, upset that decision and held the law unconstitutional. That was way back in 1824. And the habit of the New York Court of Appeals of being wrong has not necessarily changed with the lapse of time. Only as recently as 1905, in another very celebrated case, the famous New York Bakeshop case (Lochner v. New York, 198 U.S. 45), the New York Court of Appeals held a New York State law constitutional, only to be reversed by the United States Supreme Court. And in an even later case, the celebrated Workman's Compensation Case (Ives v. South Buffalo R. R. Co. 201 N. Y. 271), the New York Court of Appeals unanimously held that Workmen's Compensation laws are unconstitutional in America, while the United States Supreme Court subsequently held that such laws were constitutional. What then of the poor sheriff who should refuse to execute the judgment of the City Court, if it should turn out that the Court of Appeals was wrong, and Judges Seabury and Lehman, and the judge of the City Court, were right?

Supposing the plaintiff in the Lewkowicz case were to sue, in the courts of England or New Jersey, the sheriff of New York County who refused to execute the judgment because of the opinion of the New York Court of Appeals? According to Mr. Abbot, the courts of England or New Jersey would be bound to consider the constitutional question on its merits, and to decide for themselves whether or not the law under which the judgment was rendered was constitutional. And supposing the New Jersey or the English court should side on this much debated question with Judges Seabury and Lehman,—what then of the poor sheriff? Or, supposing the contrary opinion had prevailed in the Court of Appeals, and the sheriff were sued for trespass in New Jersey or England?

And how about the sheriff who had to execute the execution under the final judgment (for costs) in the Lewkowicz case if he should be sued in New Jersey or in England, if the court wherein he were sued should agree with Judges Seabury and Lehman and disagree with the Court of Appeals? Verily, he is in a terrible plight!

And what if the sheriff have opinions of his own, as, under Mr. Abbot's theory, he is bound to have? Or if, having none of his own, he should yet have heard of the very learned opinions of Judges Seabury and Lehman, and should refuse to execute that judgment for fear that these eminent judges might be right? It seems we are all in a terrible mess.¹

This connects the two cases discussed in our last chapter—at least, historically. The sheriff had received very little attention in the discussion of the subject before the controversy aroused by the decision in Juilliard v. Greenman. But it seems that during that discussion someone asked the question: What if, after the Supreme Court had held the law constitutional, a sheriff should refuse to execute a judgment rendered under it because he thought it unconstitutional? To which Mr. Bancroft replied in his famous pamphlet, Yankee fashion, with the question: "Who has ever heard of a sheriff refusing to execute a law because he thought it unconstitutional?" And we must admit that, for Bancroft the historian, it was a perfectly proper answer to make. If no sheriff ever had such power that is the most convincing his-

Of course, the sheriff isn't really in such a bad fix. Fortunately for him, the Special Committee is all wrong on the law as it actually is. This point is discussed fully infra, pp. 225-227.

torical proof that there is no such power, whatever may be thought of the argument from the lawyer's or logician's point of view. But, Mr. McMurtrie in his reply to Mr. Bancroft countered with the query:

"Was such a political power ever held before? Did any state ever before grant to its judicial functionaries the power of declaring and enforcing the limits of its own sovereignty?"

It was this query that led Mr. Brinton Coxe to write his famous Historical Introduction. It was the purpose of that Introduction to refute the assertion contained in Mr. McMurtrie's rhetorical question. We shall see further on that Mr. Coxe's great opus, notwithstanding its fine scholarship, was a complete failure in so far as it was meant to furnish a refutation of Mr. McMurtrie's assertion. We shall also see that Mr. Coxe's own claims as to the results of his great labors were comparatively modest. But notwithstanding Mr. Coxe's own modesty, his great work has given rise to a legend not at all in consonance with the true state of affairs; and owing to the propaganda, sometimes honest and sometimes otherwise, carried on by the supporters of the Judicial Power, this legend, instead of the historical fact, has been accepted as true both by the profession and the laity—as is frequently the case where national or class sentiment is united with religious faith.

As an example of this legend we may cite a work written by a New York lawyer, J. Hampden Dougherty, under the title The Power of the Federal Judiciary over Legislation (New York 1912), when the discussion of the subject was at its warmest owing to the famous proposal of President Roosevelt for the so-called "recall of judicial decisions." This book would deserve very little attention in a serious discussion of our subject but for the fact that it is typical of the opinions now current in the profession, and advanced by most supporters of the Judicial Power whenever this phase of the subject comes under discussion. This book also shows what may happen to a work of scholarship when it gets into the hands of the Doughertys. This is particularly important in our case because there are very few Coxes, and very few people read the Coxe we have. But the Doughertys are legion; and their books, pamphlets, and speeches, cover the length and breadth of this land from Maine to California and from the Great Lakes to

KASHMIR UNITERSITY

Ichal Library

the Gulf, with the result that the people know nothing of Coxe, and read or hear only the Doughertys. Let us, therefore, attend to what Mr. Dougherty has to say on the subject.

"Mr. McMurtrie's high reputation at the bar—says he—and the cogency of his reasoning were such as to require some rejoinder. Accordingly, Mr. Brinton Coxe of the Philadelphia Bar prepared an essay on Judicial Power and Unconstitutional Legislation. It was published posthumously, in 1893. It has been truthfully described as 'a work of vast learning, which goes over the whole general subject of the judicial power, from the broadest field of jurisprudence.' Its central theme is that this judicial power does not rest upon inference, but upon the express text of the Constitution, and that a similar power had been long recognized in jurisprudence." (Op. cit. pp. 8-9)

One who gets his knowledge of Coxe from the pen of Dougherty must necessarily conclude, and Mr. Dougherty evidently wants us to believe:

- 1. That Mr. Coxe had actually proven that the Judicial Power does not rest upon inference, but upon an express text of the United States Constitution;
- 2. That a similar power had been long recognized in jurisprudence.

As a matter of fact, Mr. Coxe never even wrote the book which he intended to write to prove the first proposition. He did write the Historical Introduction which covers the second subject, but he certainly never claimed that he proved anything like what Mr. Dougherty claims for him. All that he himself claimed to have proven is that such a power had been "heard of" before, and that it was therefore not unknown at the time when the Constitutional Convention met in Philadelphia in 1787. That is manifestly quite a different thing from the power being "long recognized in jurisprudence."

In order that there may be no mistake about it, we shall herewith reproduce verbatim Mr. Coxe's own chapter embodying his own Conclusions of the Historical Commentary:

"The following propositions—says Mr. Coxe—are contended to be correct statements of results ascertained and supported by the foregoing Historical Commentary on foreign and American laws.

"I. It accords with the principles of law and with legal reasoning that a constitution should be of such a nature, that the

judiciary thereunder should be incompetent to decide a questioned law to be unconstitutional or impeachable and hold it therefore void. This can be so when the constitution is either unwritten or written. Such an unwritten constitution was that of Great Britain in 1776 and long before. Such written constitutions are those now existing in nearly every German state. The various written constitutions which have existed in France, since the Revolution of 1789, also afford examples of the truth of this proposition. So, too, did the written constitution of New York existing in 1784, if the opinion of Rutgers v. Waddington, dated in that year, was correct. Rutgers v. Waddington is older than the U. S. constitution, but the other cases referred to under written constitutions are junior thereto.

"II. Nevertheless, it equally accords with the principles of law and with legal reasoning that a written or unwritten constitution should be of such a nature that the judiciary thereunder should be competent to decide a questioned law to be contrary to the constitution or to binding right of superior strength to the legislative power exercised, and, when it had so decided, to hold the same to be therefore void. Such can be the law when the constitution is either written or unwritten. Before the U.S. constitution was framed there were unwritten and written constitutions under which it might be a judicial and not an extrajudicial question whether challenged legislation was accordant or contrariant to constitutional or other binding right, and whether legislators had or had not proceeded secundum jus potestatis suae in enacting it. For unwritten European constitutions, this is shown by the cases adduced from the older French law, the older English law, the English law of the prerogative abroad, the Roman law of rescripts, and above all the Canon law. For an American unwritten constitution this is shown by the great case of Trevett v. Weeden in Rhode Island in 1786. For a written constitution the truth of the proposition is shown by the case of Bayard v. Singleton, in North Carolina in 1787, in which one of the counsel for the party challenging the law, was a Framer of the constitution. All the said cases are older than the constitution of the United States.

"On the whole matter, therefore, the Framers of the Constitution were at liberty to do what they deemed wisest and best in regard to the judicial competency in question, without danger of violating the principles of law or those of either civil or politic prudence. The judiciaries established or affected by the new Constitution might be either enabled to exercise, or disabled from exercising, such a competency, without danger of a leap in the dark. Either course might be taken without being unprecedented.

"The question, whether this judicial competency was ever heard of before it was established in America, has now been

answered." (Coxe, op. cit. pp. 270-271)

But the Doughertys do not only mislead and misrepresent, they sometimes directly prevaricate; and Mr. J. Hampden is a typical Dougherty. They cannot all be followed up in detail, and it would be a thankless task anyhow, but we shall cite one example from Mr. J. Hampden by way of illustrating the *mores* of the Dougherty tribe. On page 12 of his *opus*, Mr. Dougherty says:

"In Germany, Mr. Coxe finds conflicting decisions. The question, however, seems to be open in that country, but he observes that the Court of the Imperial Chamber under the old German Empire did possess this authority, and he quotes from Bluntschli to prove this contention."

Both statements as to what Mr. Coxe says about the old and the new German Empire are absolutely untrue. As to the new German Empire Mr. Coxe is emphatic that it is not an open question, and he quotes Bluntschli and others to prove that this power did not exist in the modern German Empire. He does refer to the fact that there had been two decisions of a lower court in which this doctrine, or something similar to it, had been asserted. But he also shows that the highest court of the land overruled these decisions, and closed the subject once and for all.

As to the old German Empire (that is, the empire which existed before the Napoleonic days), he quotes Bluntschli as authority for the proposition that the highest federal court had authority to establish law to which the several states were "to a certain extent subordinated." The passage quoted by Coxe from Bluntschli reads as follows:

"In composite states there is an opportunity to provide for the legislative power of the several states being held within bounds by the judicial system. The federal or imperial constitution will possess organs for the maintenance of law throughout the whole confederacy or empire, to which the chief authorities of the several states are to a certain extent subordinated. Such was the significance of Court of the Imperial Chamber in the later period of the (former) German Empire."

Which is, of course, a horse of quite a different color.

So much for the Doughertys. We shall now turn to Mr. Coxe himself.

CHAPTER III

ALLEGED FOREIGN PRECEDENTS WHICH THE FRAMERS OF THE UNITED STATES CONSTITUTION MIGHT HAVE FOLLOWED

R. BRINTON COXE begins his Historical Introduction with the following statement:

"It is correct to say that it is now law in England, and that it was law there long before 1776, that the judges of the courts are bound by acts of parliament in all cases according to the clear and clearly expressed intent of the legislature. When that intent is clear and clearly expressed, the judges cannot explain it away by any interpreting device or defeat it by that or any other means whatsoever. . . .

"It is also correct to say that, as a rule, it is law in the civilized states of modern Europe, that the legislature can bind the judiciary to obey and apply all statutes in all cases, and can restrain courts from declaring any statute to be either unconstitutional or void." (Coxe, op. cit. pp. 72-73, 75)

Mr. Coxe then proceeds to search for exceptions to this rule, in order to find support for his argument that the power in question was not "unknown" or "unheard of" at the time of the framing of the United States Constitution. In this search he ranges over the entire realm of known laws; beginning with the Roman law, following through the Canon law, and the French, German, Swiss, and English systems of jurisprudence, both modern and medieval. Swiss law he finds clearly opposed to the American system. Also the modern French law (since the Revolution). The modern French constitutional systems, those subsequent to the adoption of the United States Constitution, are particularly interesting because it is generally believed that the French thinkers influenced our Revolutionary Fathers; and Mr. Coxe himself thinks that the Framers of the United States Constitution were influenced by French experience. Also, the first French constitution, which expressly provides against the Judicial Power, was adopted only

four years after the adoption of the United States Constitution, and is therefore practically contemporaneous with it. It is therefore interesting to know what the French Revolutionists thought of their own precedents, as an indication of what the American revolutionists must have thought on the subject. We shall discuss these so-called French precedents later, and see how far they may be at all cited as a precedent for the American practice. But here we are concerned mainly with what Mr. Coxe thought about them. Let us therefore hear what Mr. Coxe has to say on the subject. His conclusions on this point are thus summarized by himself:

"First; that long before 1787 a French judicial court criticized legislation and, in two constitutional instances, declared legislation to be void because contrary to binding right ascertained by itself.

"Second; that the history of France shows clearly that the court got into extrajudicial affairs in so doing, a thing which in the end produced disastrous results to all the parliaments in France.

"The Framers of the constitution of the United States must certainly have known the first lesson. In the subsequent pages that discuss the Framers' intentions as to the Supreme Court of the United States, reasons will be given for thinking that they also profited by the second lesson.

"It is contended from the foregoing that the history of French

public law shows the following remarkable results:

"First; that under the constitution of the old monarchy, a judicial power or right to hold legislation void because contrary to

binding right, was well known:

"Second; that the first written French constitution in 1791 prohibited any judicial power or right to criticize laws for unconstitutionality or other cause, or to hold them void for any reason; which provision has continued to be public law in France until the present day."

Mr. Coxe's statement that the Framers of the United States Constitution may have also profited by the lessons to be learned from the disastrous results of the attempt to use the Judicial Power in France are somewhat puzzling, and no further elucidation is found in his published work. But his statement as to the effect which the attempt of the court under the old monarchy to assert this power had upon the Framers of the French constitution after the Revolution is certainly very instructive. Clearly, if the Judicial Power was known to the Framers of the first French

constitution, it certainly was not known favorably, since they thought fit to expressly prohibit it. And that neither the old French precedents nor the modern American precedents have made that power more favorably known to French constitution-makers is evidenced by the fact that the proposition against the use of the Judicial Power contained in the French constitution of 1791 is still the law of the land there today.

It is in the same sense also that the results of the investigation of Swiss public law are interesting. Mr. Coxe himself has the following to say on that subject:

"The example of the constitution of the United States has been followed by the Swiss in what C. J. Marshall has declared to be its most marked characteristic. The federal constitution of the Swiss Eidgenossenschaft is a written one. It provides for a federal government capable of directly operating upon individuals and not restricted to indirectly doing so through the medium of the cantons or states. This system was introduced by the constitution of 1848 and continued by that of 1874. It is avowedly copied from the constitution of the United States.

"The federal government has three branches. The legislature is the Federal Assembly, which consists of two chambers. In one chamber the several cantons are equally represented, in the other the people of the several cantons are represented according to their respective numbers. The executive is the Federal Council, which consists of seven members. The judiciary consists of one supreme court, the Federal Tribunal. . . .

"The Federal Tribunal has a civil and a criminal jurisdiction and 'also deals with questions of public law.' Its organization and authority are the subject of articles 106 to 114 of the federal constitution. The last paragraph of article 113 is thus translated:

"In all these cases, however, the laws and general obligatory resolutions passed by the Federal Assembly, and also the treaties ratified by it, shall be binding for the Federal Tribunal."

"The Federal Tribunal is thus bound to obey and apply all laws of the Federal Assembly in all cases coming under its jurisdiction. . . .

"Thus the Federal Tribunal is not competent to decide the question whether a federal law be constitutional or unconstitutional. There can be no such judicial question. Neither can it be a judicial question whether the constitution of a canton contain any thing contrary to the constitution of the confederation. Such a question is extrajudicial and is decided by the Federal Assembly. . . .

"The judiciary of a canton are not competent to decide whether a cantonal law is or is not repugnant to the cantonal constitution."

It is certainly interesting that the Swiss constitution, which is not only written, but avowedly modeled upon the United States Constitution, including the distribution of powers feature, should expressly exclude the Judicial Power which is supposed to be our great contribution to the science of government.

As we have already seen, Mr. Coxe also gets very little comfort from modern German law as it was practiced under the modern German Empire. It is true that he has found a case decided in 1875 in which an inferior court attempted to exercise the power, but this decision was overruled by the highest court of the Empire, which expressly declared that questions arising under what we might call a bill of rights or other constitutional limitations of legislative power are matters for the legislature itself to pass upon and not for the judiciary. The following excerpt from the opinion of the Imperial Tribunal in the case mentioned by Mr. Coxe is particularly interesting in connection with the subject here under consideration:

"There remains—said the Imperial Tribunal—to be considered only the question left undecided by the appellate court, namely, whether section 29 of the dyke ordinance shall be denied the force of binding law, because it is only an act of ordinary legislation, while the constitution is a law of a higher order. In a similar case, such denial was made by the formerly existing Court of Upper Appeal at Lubeck. This view however cannot be acceded to. On the contrary, the correct view on this head is that which was taken by the same court in another case only a few years before. This correct view is as follows: the constitutional provision that wellacquired rights must not be injured, is to be understood only as a rule for the legislative power itself to interpret, and does not signify that a command given by the legislative power should be left disregarded by the judge because it injures well-acquired rights. This is said without affecting the question whether the state may or may not be bound to grant damages; a matter not here brought into consideration. There is, therefore, no occasion to investigate whether well-acquired rights have been violated or not. The question is not whether a particular principle of the constitution has been altered or not; but whether the law could have been enacted without an alteration of the constitution itself, and therefore without applying the forms prescribed for such alteration. This last question, however, is one which can not be examined by the judiciary." (Coxe, op. cit. pp. 101-102)

We have already seen that the investigation of the precedents of the Old German Empire failed to reveal anything more than that the highest court of that Empire had the right to establish law which was binding on the individual states constituting that Empire. This clearly has nothing to do with the subject here under investigation, which is not the question whether the courts of a superior sovereignty may have the power of declaring the act of an inferior sovereignty unconstitutional on the ground that it is repugnant to the constitution of the superior sovereign, but whether a court ought to have the power to declare a legislative enactment of its own government invalid on the ground that it is repugnant to its own constitution.

We shall now proceed to examine those cases of foreign law which, in Mr. Coxe's opinion, support his contention that this power was "known" prior to or at the time of the framing of the United States Constitution. The first of these instances Mr. Coxe cites from the Roman Law of Rescripts. He says that under the Justinian Code a judge was not bound always to obey a rescript of the Emperor, and could declare it invalid if it was contra jus. Just what this has to do with the subject here under consideration is difficult to perceive, unless Mr. Coxe was determined to cite every possible case involving the right of a judge to decide between superior and inferior law. Mr. Coxe himself quotes the provisions of the Justinian Code wherein the judges were admonished to disregard rescripts, which were not laws in the ordinary sense but special manifestations of the will of the Emperor in special cases, frequently merely acts of grace. It was the evident desire of the law-giver that if somebody importuned the Emperor into issuing a rescript which was contra jus it should be disregarded by the judges. The text of this provision is as follows:

(a) "We admonish all judges of every administration, greater or less, in our whole commonwealth, that in the trial of every sort of litigation, they permit no rescript, no pragmatic sanction and no imperial adnotation to be alleged before them, which seems to be adverse to general law or to public utility: but that they have no doubt that general imperial constitutions are to be observed in everyway."

(b) "We command that rescripts which are obtained from us contra jus shall be rejected by all judges unless perchance there be something therein which injures not another and profits him who

seeks it, or gives pardons for crime to the suppliants." (Coxe, op. cit. pp. 108-109)

Clearly, there is no precedent in this for our Judicial Power. From the Roman Law Mr. Coxe turns to the Canon Law for aid and comfort. But the results here are just as disappointing. After a very exhaustive and very learned investigation of the Canon Law, both in England and on the European continent, as it appears in text writers and as it was applied in actual cases, Mr. Coxe manages to draw some sort of parallel between the doctrine of the Canon Law in its relation to the temporal power on the one hand and modern constitutional law as practiced in the United States on the other. But upon closer examination it will be found that there is no analogy whatever between them, and that the similarity found by Mr. Coxe is the product of his excessive zeal. His ardent wish was certainly father to his roseate thoughts on this subject. Mr. Coxe's own conclusions from his investigation of the Canon Law are stated by him in a series of propositions as follows:

"1. It is the ancient doctrine of the Canon law that temporal, lay, or civil statutes are null for certain Canonical cause. It is the received doctrine of lawyers throughout the United States that an act of Congress or a state statute may be void or null for constitutional causes.

"2. Such Canonical cause aforesaid is defect of lay power to enact temporal statutes contrary to ecclesiastical right or liberty. Here and now, it is the received doctrine of lawyers that, under a written constitution, there can exist no legislative power of making laws which are contrary to such constitution and in conflict therewith.

"3. A Canon law court will, upon fitting judicial opportunity, proceed as competent to inquire and decide concerning such Canonical cause and such defect of power and (they being found) to hold the questioned temporal statute to be null, ipso facto et ipso jure. This is shown by the Rotal case of the Roman lands and Genoese testament, decided in 1648, in which the Roman Rota expressly held that every temporal statute ascertained and decided to be contrary to ecclesiastical liberty is ipso facto et jure nullum ex defectu potestatis laicorum statuentium.

"It was therefore neither a novelty nor an inelegancy in point of jurisprudence for the framers of an American constitution so to frame it that there should exist thereunder a judicial competency of deciding questioned legislation to be constitutional or unconsti-

tutional and of holding it void or valid accordingly." (Coxe, op. cit. pp. 162-3)

This sounds very important. But it is not quite as important as it sounds on first hearing; and Mr. Coxe, the scholar, in the end furnishes the proof of the unimportance of the results of his researches into Canonical law, notwithstanding the enthusiasm born of his great zeal on behalf of Judicial Power, with which he hails these results. For Mr. Coxe himself shows that this was not a case of a court declaring an act of its own legislature null and void, but a case where a court held inoperative a law made by a different and inferior government, which is of course an entirely different matter, and has no bearing on the subject with which we are concerned. Mr. Coxe himself shows that in the Middle Ages there was a distinct division of power into temporal and spiritual; and that the spiritual claimed to be superior to the temporal power. The Canon Law was the law of the spiritual realm, and it was by reason of the claim of the superiority of the spiritual power over the temporal power that the Canon Law jurists and the Canon Law courts declared the incompetency of the laity to enforce lay laws when they dealt with spiritual matters or spiritual persons.

But even aside from the claim of the spiritual power to be superior to the temporal, the mere division into two separate realms was of course sufficient for the decision of the cases as they were decided. For the courts of an independent sovereignty are bound by its own laws. In order to be at all analogous to the constitutional law of the United States it would have to be shown that a canonical court declared a law made by the legislature of its own realm (that is to say, a law laid down by a canonical congress, or whatever was the law giver in the spiritual realm), to be void for some defect of constitutional power. But of course no such cases exist. Mr. Coxe's assertion that the example of what the Canon Law courts did to the temporal laws which they considered inferior or at least foreign might have served as a model for the framers of the United States Constitution, is therefore entirely unwarranted. For the power which he claims the United States Constitution gave to the United States judiciary is not only that of declaring invalid the laws of the inferior state sovereignties but also those of its own government. Only precedents for this power count in such an inquiry. And no such precedents can be found in the entire field of medieval jurisprudence, whether temporal or spiritual.

Passing from the Middle Ages to modern times, Mr. Coxe's search for precedents on the European continent during all of the period from the close of the Middle Ages up to the time of the adoption of the United States Constitution, resulted in the finding of three cases under the old French monarchy which are claimed to bear on this subject. We shall give his discovery in his own words. Says he:

"The parliament of Paris, upon the accession of the minor king Lewis XIII., in 1610, made a judicial decision declaring the queen mother to be regent, thus ignoring any claims of any prince of the blood. Martin, in his History of France (XI, page 4) thinks that there was no law 'which attributed this exorbitant right to this court of justice.' It was, however, a precedent for two great cases in which the parliament declared legislative acts of kings of France to be null and void. The first of these cases was that of the regency during the minority of Lewis XIV. His father, Lewis XIII., by a formal declaration of his last will, made in view of approaching death, enacted that the queen consort should be regent with powers greatly restricted by those of a council of regency, which he therein appointed. After the king's death (1643) the parliament of Paris declared the queen to be sole regent without any council, thus partially annulling the enactment of the late king, on the ground 'that the queen once recognized as regent by virtue of the last wishes of the late king, consented to by the grandees of the kingdom, had, of right, the plentitude of the royal power.'

"The second case is that of the regency during the minority of Lewis XV. By the testament of Lewis XIV., it was enacted that the regency should be vested in a council, of which the next prince of the blood, the Duke of Orleans, should be president. Upon the king's death, the Duke of Orleans successfully opposed the registration of the testament by the parliament of Paris. The duke claimed that the testament was contrary to the laws and usage of the kingdom, and prejudicial to his right to be regent. This claim was sustained by the parliament, which adjudged the regency to the Duke of Orleans." (Coxe, op. cit. pp. 79-80)

Mr. Coxe is, however, scholarly and honest enough to recognize the meagreness of the support for the Judicial Power which can be derived from these alleged precedents. For he himself says:

"In making a comparison of these cases in the old French public law with cases in constitutional law on this side of the

Atlantic, it is not asserted that it runs upon four legs, for there was no such distinct division of powers in the former, as exists in the latter. The parliaments, although judicial courts, were competent to decide many extrajudicial questions."

To which should be added the following: As to the first of these alleged cases, there is no pretense even that any law was set aside by the Parliament of Paris either in its judicial or its extrajudicial capacity. On the contrary, all that is asserted is that in a contest for the regency between the queen mother and the princes of the blood, the Parliament of Paris, concededly a quasipolitical body, sided with the queen mother. Whether there was or was not any law on the subject does not appear;—at least, not from Mr. Coxe's meagre report of this famous historical incident. And the historian Martin's comment, quoted by Mr. Coxe, throws no light on the subject; for the evident meaning of the remark is, that in the historian's opinion a mere court of justice—even a court of justice possessing extrajudicial powers—had no right under any law of the realm to stick its nose into so important a subject as a contest for the regency.

As to the other two cases, it is only necessary to remark that clearly the Parliament was acting in its extrajudicial capacity, and not as a court of justice. And further, that no laws, as we understand the term, were involved, and no law of any kind was set aside. Both of these incidents, like that commented upon by Martin, relate to contests for the regency, and that subject was evidently not governed by any general law. There was therefore no law to be either supported or set aside. And also nothing for a court of justice to pass upon. The cases were clearly political. What happened was that two French kings attempted by their wills to set certain limits upon the powers of the regents appointed in these wills in view of the minority of the respective heirs to the throne; that those regents, when they came into power, disregarded those limits, and that the Parliament of Paris subserviently acquiesced in this action. It is, therefore, really quite immaterial whether this subservience was in its judicial or its extrajudicial capacity, although it is quite evident that it was in its extrajudicial capacity.

Two things, however, are interesting in connection with the French "precedents." One is the lesson pointed out by Mr. Coxe himself, quoted above. These actions of the French parliament

got the parliament into trouble and led to the peculiar provision contained in the first written French constitution, expressly prohibiting courts from interfering in political matters by attempting to pass judgment upon legislative acts of the properly constituted legislative power. The second is also noted by Mr. Coxe, and it is this: That this peculiar provision of the French constitution of 1791, was thought by the French thinkers to be the logical consequence of the distribution of powers, as it undoubtedly is. This is the more significant because the French constitution, unlike the American Constitution as it came from the hands of the Framers, put particular stress on "guarantees." Article 16 of the French constitution of 1791 reads as follows:

"Every society in which the guarantee of rights is not secured, or the separation of powers is not fixed, has no constitution."

This sounds remarkably reminiscent, or rather prophetic, of Mr. Marshall's famous language in *Marbury v. Madison*. But the French philosophers and statesmen whose influence on the American constitution-makers is universally acknowledged, drew from these premises conclusions exactly contrary to those drawn by our famous Chief Justice.

In another place this same constitution provides:

"The tribunals cannot interfere with the exercise of the legislative power, nor suspend the execution of the laws, nor encroach upon administrative functions, nor cite any administrators to appear before them on account of their functions."

Which leads Mr. Coxe to remark, ruefully:

"An explicit provision, upon the competency or incompetency of the judiciary to criticize legislation, was certainly proper, if not unavoidable. The decision of the constituent powers in the new constitution was against the competency. This determination of the question must have been largely due to the peculiar idea of the separation of powers then prevailing in France. The quotations above given show that the greatest importance was attributed to a real separation of powers." (Coxe, op. cit. p. 78)

Having been thus balked on the European continent, Mr. Coxe turns hopefully to England, the country from which we have derived most of our legal notions and political ideas. That in modern England no court can declare a law unconstitutional, is, of course, well known. That such was not only the law, but the judicial

thought of the most famous English jurists at the time of the adoption of our constitutions, is not only conceded but emphasized by Mr. Coxe; in which respect Mr. Coxe is quite unlike many other supporters of the Judicial Power, who often overlook and sometimes misrepresent English thought on the subject. According to Mr. Coxe, this was the settled constitutional law of England for a hundred years prior to the adoption of the United States Constitution. But Mr. Coxe thinks that it was otherwise prior to the "glorious revolution" of 1688. Not, indeed, that the power to declare laws unconstitutional was recognized prior to 1688, but that such claims were occasionally made by English lawyers, and that on a few occasions there were attempts by English judges to exercise it. Upon close scrutiny, however, the results of Mr. Coxe's excursion into English history in search of precedents for the Judicial Power simmer down to this:

(a) That Lord Chief Justice Coke, in a famous case known as Dr. Bonham's case, decided in 1613, said:

"And it appears in our books, that in many cases, the common law will control acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void."

(b) That the Lord Chief Justice cites a number of cases from the old reports in support of his assertion that the doctrine announced by him "appears in our books," but that upon examination of those cases themselves his assertion is found to be of doubtful validity.

(c) That Lord Coke's doctrine was referred to approvingly twice by other judges, namely, Lord Chief Justice Hobart, in a case known as Day v. Savadge (Hob. Rep. 87), decided in 1614, and Lord Chief Justice Holt, in a case known as City of London v.

Wood (12 Mod. 669) decided in 1701.

(d) And that, finally, in 1686 a case was decided in which this doctrine was actually put in operation as the ratio decidendi. This was the case of Godden v. Hales which played a rather important rôle in English history.

Dr. Bonham's case, and the cases referred to therein by Lord Coke, are discussed in a separate Appendix. Here it is sufficient

¹ See Appendix A, infra, at end of this volume.

to say that Lord Coke's famous constitutional theory laid down therein was merely a dictum. That such was the case sufficiently appears from a passage of Bowyer's Readings in the Middle Temple (1850), quoted by Mr. Coxe himself. This passage of Bowyer's is interesting also because it is the only indication contained in Coxe's work as to what Lord Chief Justice Hobart is supposed to have done or said in Day v. Savadge. We shall therefore reproduce it here verbatim. It reads as follows:

"We must receive with considerable qualifications what Lord Coke said in Doctor Bonham's case (8 Rep. 118), in which he declared that the Common Law doth control Acts of Parliament, and adjudges them void when against common right and reason. And Lord Chief Justice Holt, in The City of London v. Wood (12 Mod. 687), adopted this dictum of Lord Coke, which is supported by Lord Chief Justice Hobart, in Day v. Savadge (Hob. Rep. 87), who insisted that an Act of Parliament made against natural equity, so as to make a man judge in his own cause, was void."

Evidently, Lord Chief Justice Hobart's opinion was merely a dictum, and not a ratio decidendi. So also was Lord Chief Justice Holt's opinion in City of London v. Wood, although Mr. Coxe seems to think otherwise. This is quite clear from Lord Holt's opinion as quoted by Mr. Coxe himself. It is as follows:

"What my Lord Coke says in Bonham's case, in his 8 Co., is far from any extravagancy, for it is a very reasonable and true saying, that if an act of parliament should ordain that the same person should be party and judge, or which is the same thing, judge in his own cause, it would be a void act of parliament; for it is impossible that one should be judge and party, for the judge is to determine between party and party, or between the government and the party; and an act of parliament can do no wrong, though it may do several things that look pretty odd; for it may discharge one from his allegiance to the government he lives under, and restore him to the state of nature; but it cannot make one who lives under a government judge and party. An act of parliament may not make adultery lawful, that is, it cannot make it lawful for A. to lie with the wife of B.: but it may make the wife of A. to be the wife of B. and dissolve her marriage with A."

We now come down at last to a real decision,—the only real decision actually found—Godden v. Hales. That case was as follows:

In the reign of Charles II, during the contest between the

Catholics and Protestants in England following the Restoration, a statute was passed popularly known as the Test Oath Act, which required everyone in the public service, including officers of the army, to take an oath of allegiance to the Church of England. It appears that Sir Edward Hales, who subsequently became somewhat celebrated in English history, was appointed colonel in the army by James II, and that he did not take the required oath, upon James issuing to him a dispensation absolving him from the requirement. Under the statute, the oath had to be taken within three months of taking office, and one exercising office without taking the oath within the required time was liable to a fine in the sum of £500. The action in question was a suit to recover from Hales this fine for his violation of the statute. The defendant pleaded in defense that after his taking office, and before the three months expired, the king, by his letters patent, had pardoned, released, and dispensed with said oath. The question turned upon the so-called "law of prerogative." It was claimed on behalf of the defendant (really on behalf of King James) that there was a distinction between ordinary laws, referred to as "laws of property," and matters affecting the government or administration as such, and the prerogative of the King as the chief executive of the nation with respect thereto, referred to in the argument as "laws of government." The court, by a vote of 10 to 2, upheld the King's contention to the effect that Parliament could not by a statute interfere with his prerogative in the administration of the government, and that statutes attempting to do so are null and void. The following paragraph quoted by Mr. Coxe contains the essence of the decision:

"The Lord Chief Justice took time to consider of it, and spake with the other judges, and three or four days after, declared that he and all the judges (except Street and Powell who doubted) were of opinion, that the kings of England were absolute sovereigns; that the laws were the king's laws; that the king had a power to dispense with any of the laws of government as he saw necessity for it; that he was the sole judge of that necessity; that no act of parliament could take away that power; that this was such a law. . . ." (Coxe, op. cit. p. 168)

Several things should be noted about this case:

First, that this was not a case where the court decided between a prior constitution and a subsequent act of the legislature, but between a prior law and an alleged subsequent law. It is a fundamental principle of statutory construction that a later law supersedes a prior law, assuming that it proceeds from an equally high source. The question, therefore, was utterly unlike the questions presented in our constitutional law under the Judicial Power. The real question was, whether King James had such a prerogative as he claimed, and whether, therefore, his letters patent were a subsequent law emanating from a source of equal standing with Parliament. If there be any analogy at all with our problem of constitutionality, it was rather the constitutionality of King James dispensing law that was called into question, and not that of the act of parliament. And the decision was in favor of the constitutionality of King James' Act on the ground of a division of power similar to that which existed in the Middle Ages between the spiritual power and the temporal power.

Not that the Court was quite consistent in its position. The assertion of the judges that the laws of England are the "King's laws," seems to assert a different theory. We need not enter here into the question of whether this last assertion was true or not. What is important here is the implications of this position from a constitutional point of view. The court here in fact asserted that the Kings of England being "absolute sovereigns," and the laws of England being therefore the "King's laws," the letters patent issued to Hales emanated from the same source as the law under which he was being prosecuted, and a subsequent law emanating from the source. In fact, the King was the only real legislature in England. Parliament itself is the King's parliament, and, therefore, only a subordinate legislature. The King, as an act of grace, chooses to give it the power to make general laws—that is, laws of property—but he reserves for himself the government of the country, and the making of laws of government. But the judges are the King's judges, not the judges of Parliament, and are, therefore, bound by the King's laws. If there be anything at all analagous to this situation in this country it would be if the claim were made that a referendum can override a provision of the constitution. Then the logic would follow the Lord Chief Justice's logic in Godden v. Hales: The people are absolute sovereigns, the constitutions are their constitutions and laws are their laws. No constitution, and no law, can therefore abrogate or infringe upon their will when clearly expressed. When the people themselves speak in any particular instance, clearly and unmistakably, their word is the last word on the subject, and their will must prevail irrespective of what had previously been enacted in any constitution, for no constitution can infringe upon the High Prerogative of the people themselves to express their own will.

But we need not enter into these very interesting speculations, for the simple reason that Mr. Coxe himself admits that this decision was erroneous when made. But it is even more important to note here, as a matter of the greatest political if not exactly judicial importance, that this decision led to a revolution, namely the so-called "glorious revolution" of 1688. We shall first hear Mr. Coxe himself on the subject, and then Lord Macaulay, who has something to say on the subject of the decision as well as the judges who rendered it. After examining the subject fully we would be very much surprised if the Framers of the United States Constitution had in fact followed the "precedent" of Godden v. Hales, and made the doctrine of Lord Chief Justice in that case the law of this country. Mr. Coxe says:

"The decision in this case is celebrated in English history as intimately connected with the causes of the revolution of 1688. The abolition of the royal power of dispensing with any statute, made in the 1st year of William and Mary, was caused by the existence of this decision. The case is discussed at length by Macaulay, who criticizes both the decision and the motives of the court with great severity. The second paragraph of the bill of rights in the statute of 1. William and Mary, sess. 2. cap. 2., formally declares to be illegal what the decision declared to be legal. It is thus matter of authority that the decision was erroneous not only after the Revolution but also when it was made."

It should also be noted here that one of the first acts of Parliament after the revolution was to impeach Mr. Hales.²

And here is Macaulay's account of the celebrated case:

"May was now approaching; and that month had been fixed for the meeting of the Houses: but they were again prorogued to November. It was not strange

² In view of the nature of the decision in Godden v. Hales, and the character of the judges who rendered it, it seems rather odd to find the Special Committee of the New York State Bar Association refer to these judges as Coke's "patriotic successors." See the first report of the committee at pp. 21-22. However, after the new reading of American history that this committee has given us, one need not be surprised at this new reading of English history. The character of the authorities relied upon by the judges in giving the judgment in Godden v. Hales will be further discussed in Appendix A, at end of this volume.

that the King did not wish to meet them: for he had determined to adopt a policy which he knew to be, in the highest degree, odious to them. From his predecessors he had inherited two prerogatives, of which the limits had never been defined with strict accuracy, and which, if exerted without any limit, would of themselves have sufficed to overturn the whole polity of the State and of the Church. These were the dispensing power and the ecclesiastical supremacy. By means of the dispensing power, the King purposed to admit Roman Catholics, not merely to civil and military, but to spiritual offices. By means of the ecclesiastical supremacy, he hoped to make the Anglican clergy his instruments for the destruction of their own religion.

"This scheme developed itself by degrees. It was not thought safe to begin by granting to the whole Roman Catholic body a dispensation from all statutes imposing penalties and tests. For nothing was more fully established than that such a dispensation was illegal. The Cabal had, in 1672, put forth a general Declaration of Indulgence. The Commons, as soon as they met, had protested against it. Charles the Second had ordered it to be cancelled in his presence, and had, both by his own mouth and by a written message, assured the Houses that the step which had caused so much complaint should never be drawn into precedent. It would have been difficult to find in all the Inns of Court a barrister of reputation to argue in defence of a prerogative which the Sovereign, seated on his throne in full Parliament, had solemnly renounced a few years before. But it was not quite so clear that the King might not, on special grounds, grant exemptions to individuals by name. The first object of James, therefore, was to obtain from the courts of common law an acknowledgment that, to this extent at least, he possessed the dispensing power.

"But, though his pretensions were moderate when compared with those which he put forth a few months later, he soon found that he had against him the whole sense of Westminster Hall. Four of the Judges gave him to understand that they could not, on this occasion, serve his purpose; and it is remarkable that all of the four were violent Tories, and that among them were men who had accompanied Jeffrys on the Bloody Circuit, and who had been consenting to the death of Cornish and of Elizabeth Gaunt. Jones, the Chief-justice of the Common Pleas, a man who had never before shrunk from any drudgery, however cruel or servile, now held in the royal closet language which might have become the lips of the purest magistrates in our history. He was plainly told that he must either give up his opinion or his place. 'For my place,' he answered, 'I care little. I am old and worn out in the service of the crown: but I am mortified to find that Your Majesty thinks me capable of giving a judgment which none but an ignorant or a dishonest man could give.' 'I am determined,' said the King, 'to have twelve Judges who will be all of my mind as to this matter.' 'Your Majesty,' answered Jones, 'may find twelve Judges of your mind, but hardly twelve lawyers.' He was dismissed, together with Montague, Chief Baron of the Exchequer, and two puisne Judges, Neville and Charlton. One of the new Judges was Christopher Milton, younger brother of the great poet. Of Christopher little is known, except that, in the time of the civil war, he had been a Royalist, and that he now, in his old age, leaned toward Popery. It does not appear that he was ever formally reconciled to the Church of Rome: but he certainly had scruples about communicating with the Church of England, and had therefore a strong interest in supporting the dispensing power.

"The King found his counsel as refractory as his Judges. The first barrister who learned that he was expected to defend the dispensing power was the Solicitor-general, Heneage Finch. He peremptorily refused, and was turned out of office on the following day. The Attorney-general, Sawyer, was ordered to draw warrants authorizing members of the Church of Rome to hold benefices belonging to the Church of England. Sawyer had been deeply concerned in some of the harshest and most unjustifiable prosecutions of that age; and the Whigs abhorred him as a

man stained with the blood of Russell and Sidney: but on this occasion he showed no want of honesty or of resolution. 'Sir,' said he, 'this is not merely to dispense with a statute: it is to annul the whole statute law from the accession of Elizabeth to the present day. I dare not do it; and I implore Your Majesty to consider whether such an attack upon the rights of the Church be in accordance with your late gracious promises.' Sawyer would have been instantly dismissed, as Finch had been, if the government could have found a successor: but this was no easy matter. It was necessary, for the protection of the rights of the Crown, that one at least of the crown lawyers should be a man of learning, ability, and experience; and no such man was willing to defend the dispensing power. The Attorney-general was therefore permitted to retain his place during some months. Thomas Powis, an obscure barrister, who had no qualification for high employment except servility,

was appointed Solicitor.

"The preliminary arrangements were now complete. There was a Solicitorgeneral to argue for the dispensing power, and a bench of Judges to decide in favor of it. The question was therefore speedily brought to a hearing. Sir Edward Hales, a gentleman of Kent, had been converted to Popery in days when it was not safe for any man of note openly to declare himself a Papist. He had kept his secret, and, when questioned, had affirmed that he was a Protestant with a solemnity which did little credit to his principles. When James had ascended the throne, disguise was no longer necessary. Sir Edward publicly apostatized, and was rewarded with the command of a regiment of foot. He had held his commission more than three months without taking the sacrament. He was therefore liable to a penalty of five hundred pounds, which an informer might recover by action of debt. A menial servant was employed to bring a suit for this sum in the Court of King's Bench. Sir Edward did not dispute the facts alleged against him, but pleaded that he had letters-patent authorizing him to hold his commission notwithstanding the Test Act. The plaintiff demurred, that is to say, admitted Sir Edward's plea to be true in fact, but denied that it was a sufficient answer. Thus was raised a simple issue of law to be decided by the court. A barrister, who was notoriously a tool of the government, appeared for the mock plaintiff, and made some feeble objections to the defendant's plea. The new Solicitor-general replied. The Attorney-general took no part in the proceedings. Judgment was given by the Lord Chief-justice, Sir Edward Herbert. He announced that he had submitted the question to all the twelve Judges, and that, in the opinion of eleven of them, the King might lawfully dispense with penal statutes in particular cases, and for special reasons of grave importance. The single dissentient, Baron Street, was not removed from his place. He was a man of morals so bad that his own relations shrank from him, and that the Prince of Orange, at the time of the Revolution, was advised not to see him. The character of Street makes it impossible to believe that he would have been more scrupulous than his brethren. The character of James makes it impossible to believe that a refractory Baron of the Exchequer would have been permitted to retain his post. There can, therefore, be no reasonable doubt that the dissenting Judge was, like the plaintiff and the plaintiff's counsel, acting collusively. It was important that there should be a great preponderance of authority in favor of the dispensing power; yet it was important that the bench, which had been carefully packed for the occasion, should appear to be independent. One judge, therefore, the least respectable of the twelve, was permitted, or more probably commanded, to give his voice against the prerogative."

CHAPTER IV

AMERICAN PRECEDENTS FOR THE JUDICIAL POWER

American "precedents" for that power, one would imagine that the number of these precedents were legion,—and that if the exercise of the Judicial Power before the adoption of the United States Constitution was not as common as it is today, it was at least not very rare. This applies not only to the Daughertys, but also to those who should be in the Coxe, or at least near-Coxe, class. The latest treatise on our subject is the aforementioned book of Professor Haines, American Doctrine of Judicial Supremacy, which appeared in 1915. Let us therefore hear what he has to say on the subject of "American precedents":

"But it was not uncommon—says Professor Haines—for colonial lawyers and colonial courts to regard natural law and the ancient principles of the common law as superior to ordinary legislative acts.

"By 1775 the principle had taken such a firm hold upon the minds of lawyers and judges that decisions were rendered in rapid succession in which was maintained the authority of courts, as guardians of a fundamental law, to pass upon the acts of coordinate departments. This authority was steadily asserted after the colonies became states, and by an irresistible process was made one of the prime features of the new federal system established by

the Constitution of 1787.

"The state cases in which the American doctrine was first announced, and which were accepted as precedents in its development and extension, have an important rôle in the legal history of the United States. To present the doctrine as conceived by the founders of the American government it is necessary to give a concise statement of the facts and the issues involved in each of these precedents and to quote freely from the opinions of the judges relating to the invalidity of legislative acts. The list as presented is not intended to be exhaustive, but it is aimed to include a survey of the important early cases which were known and recognized as instances involving the direct issue of the validity of a legisla-

tive act as in conflict with the law of nature or fundamental written law." (Haines, op. cit. p. 73)

Professor Haines then proceeds to give a table of twenty-six cases decided, or claimed to have been decided, between 1778 and 1819, proving his thesis.

The first thing to be noticed about this formidable list is that the great majority of cases listed—no less than nineteen in number—refer to the period subsequent to 1787. So that whatever influence these cases may have had in the "development and extension" of the "American Doctrine," they certainly could have had no influence on the formation or adoption of the United States Constitution.

Another rather interesting feature of the list is that it commences with 1778, thus leaving out entirely the colonial period, although, according to our learned author's assertion, "it was not uncommon" for the colonial courts to regard the ancient principles of the common law as superior to ordinary legislative acts. The only way a court can regard one kind of law superior to another is by basing a decision thereon, and if there were such decisions they should certainly have been included in the list. Of course, the truth is that there were no such decisions. The scholarly Coxe admits that much, in so many words. He says:

"It may therefore seem to some natural to expect that cases can be found in which colonial courts decided acts of colonial legislatures to be repugnant to the laws of England and held them therefore void. No such cases are extant." (Coxe, op. cit. pp. 202-3)

We now turn to the list "as is." It is not a formidable list: Seven cases for the entire period from 1776 to 1787, with thirteen separate States, each having its own judiciary, to draw upon. But then, the learned professor assures us that the list "is not intended to be exhaustive," and contains only the *important* cases. So there may be some other cases which he has omitted as unimportant. Evidently that is what he would like us to believe.

Let us therefore see what these cases did decide, and how im-

¹Prof. Haines does discuss two alleged colonial precedents, and these are considered at length in Appendix B, infra, end of volume. But Prof. Haines' failure to include these cases on his list is nevertheless significant, when taken in connection with the manner in which his table is made up. Prof. Haines evidently realized that these alleged precedents could not possibly be made to fit into any list.

portant they are as precedents, so that we may judge for ourselves how "irresistible" was their effect in the process which made the judicial factor "one of the prime features of the new federal system established by the Constitution of 1787."

The first case on this list is that of Josiah Phillips, decided in Virginia in 1778. Prof. Haines informs us that this was a case of a Bill of Attainder against Phillips, and that the court "refused to render sentence and Phillips was tried according to common law."

This would certainly seem a "precedent" for something or other, although it is not clear just for what. Unfortunately the most important part of Prof. Haines' statement—namely, that the court refused to render sentence—is historically doubtful, to say the least. There is no such record anywhere, and certainly there is no record of any opinion of the court for its alleged refusal to act. The entire case seems to be mythical as far as any constitutional aspect is concerned.

The next case on the list is *Holmes v. Walton*, supposed to have been decided in New Jersey in 1780. This case is treated at length in our Appendix C, *infra*; where the mythical nature of this case is demonstrated beyond peradventure of a doubt.

The third case on the list is the case of Commonwealth v. Caton, decided in the Courts of Virginia in 1782. As to this case Prof. Haines informs us that the law involved was: "Act to condemn for treason"; and that the decision of the court was: "Act held not valid because senate did not concur." This would seem a rather queer case to get on a list like this, particularly since the list is "not intended to be exhaustive," and is aimed to include only important cases. How important is it to a discussion of the subject of the derivation of constitutional power or any precedents for it, that an act of the legislature consisting of two chambers which passed only the Assembly, and in which the Senate did not concur, was held to be invalid? Evidently Prof. Haines must not be taken at his word that he did not intend his list to be exhaustive, but to include only the important cases. But that need not surprise us. In this respect Prof. Haines was following good precedent as established by the "precedent"-mongers. Commonwealth v. Caton had been cited literally scores of times, without further explanation, as an important "precedent." The only thing new about Prof. Haines is that he got the case a little mixed. As a matter

of fact, the "law" involved in the decision, insofar as it held anything invalid, was not an "act to condemn for treason" but a resolution of the lower house of a two-chambered legislature pardoning a man who had been convicted for treason. There was, to be sure, a real constitutional question involved, but on that the decision was the other way.

Caton and two associates were condemned for treason under an act passed in 1776 which took from the executive the power of granting a pardon in such cases. The House of Delegates, the lower house of the Virginia legislature, passed a pardoning resolution, and sent it to the Senate for concurrence; but the Senate did not concur. The matter came before the court on two questions: One as to the validity of the Act of 1776, its validity being attacked on behalf of the condemned men as an unwarranted interference with the pardoning power of the executive. The other question was whether the pardon granted by the House of Delegates was sufficient without the concurrence of the Senate. The decision of the court was that the law in question was not unconstitutional, but that the pardon was insufficient because of the lack of concurrence by the Senate.²

Another case on Prof. Haines' list is supposed to have been decided in Connecticut in 1784-5, and is given as the Symsbury case. This case is not noted by Coxe; nor is it noted in Thayer's Cases on Constitutional Law, which Prof. Haines himself says contains the most complete account of state cases. And Prof. Haines' own rather confused account of the case would indicate that Coxe and Thayer were correct in not considering it a "precedent." 3

Notwithstanding the fact that no law was declared unconstitutional in this case, and the occasion did not call for any such thing, we are told that Judge Wythe made a great oration on this occasion, quite in the modern manner; and this oration is frequently trotted out by the precedent-mongers as proof of the "contemporary" attitude. But the authenticity of his oration is extremely doubtful. See Appendix C, at end of this volume.

The Symsbury Case is so utterly unimportant that we did not care to weary our readers by a recital of its complicated details in the text. In view, however, of the fact that Prof. Haines has dignified it by a place on his list it may be worth while to give a detailed account of it in this place, for the benefit of those who are ready to run down any clue. This case did not involve any law, but a grant of lands—a dispute between the Town of Symsbury and one Thomas Bidwell over the title to a tract of land. On May 12, 1670, the "Governor and Company" of the Colony of Connecticut granted to the "Proprietors of the town of Symsbury" a tract of land of which the boundaries were vaguely defined. It was the evident intention of the grantors that the tract should be ten miles square. The easterly

This reduces the list to three real cases. But before considering these three cases, we must refer to a case which although not included by Haines in his list is referred to by him later, and is also mentioned by Mr. Meigs, whose account Coxe incorporated in his work, and which has been often referred to since. This is a case which is supposed to have been decided in the courts of Massachusetts in 1786-1787. Unfortunately, nobody has ever been able to find any record of it. Not even the name of the case is definitely known. But since we do aim at exhaustiveness, we cannot overlook it. We have, therefore, discussed it at length in our Appendix C, following a lead of Mr. A. C. Goodell who claims to have identified it as the case of Brattle v. Hinckley.

The first real case bearing on the subject is that of Rutgers

and southerly boundary lines were indicated, but not their exact dimensions. Subsequently several attempts were made to survey and locate the lines, and the legal effect of one of these surveys, the last, was the principal question in the case. This survey was made in 1727, and attempted to draw the westerly line of the tract along what became known as the Kimberly line, which was different from the line of previous surveys. In the meantime—on January 26, 1686—the General Assembly of the Colony made a grant to the "Proprietors of the towns of Hartford and Windsor" of all the land "west of Symsbury" up to a certain river. Bidwell, the defendant in the case, claimed under this last grant, while the Town of Symsbury claimed under the original grant. Bidwell's claim to title was based on the proposition that the Kimberly line established the westerly boundary of the original grant, and since the land in question lay west of that line it was included in the subsequent grant to the "Proprietors" of Hartford town, under whom he claimed. The Court held that the original grant was intended to convey a tract of land in the geometrical figure "called a rhombus," of which each line would be distant ten miles from its parallel line. As so construed the original grant included the disputed tract. The Court therefore gave judgment for the plaintiff. In the course of its opinion the Court said: "The act of the general assembly, confirming Kimberly's line operated to restrict and limit the western extent of the jurisdiction of the town of Symsbury, but could not legally operate to curtail the line before granted to the proprietors of the town of Symsbury without their consent." It is this last statement that gives Professor Haines his excuse for saying that this case involved an "act of assembly, taking property without consent of owner" and that the decision was: "Act invalidated-contrary to fundamental law." There is not, however, the slightest warrant in the case for either of the statements. The General Assembly never intended to take anything from the town of Symsbury, as the second grant was specifically of lands lying "west of Symsbury." And the only thing that the Court held was that the Kimberly line did not establish the westerly boundary of the Symsbury grant. In this connection it must be remembered that at the time of the survey which established the Kimberly line, both grants had already been made, and there was no new grant made after that line was established. What was included in the second grant could not, therefore, have possibly depended on the Kimberly line, which was not in existence when that grant was made, but on the meaning of the original grant to the proprietors of the town of Symsbury-since the second grant expressly excluded the tract granted to the Proprietors of Symsbury as it stood then. The court, therefore, very properly concluded that the establishment of the Kimberly line was probably intended to establish the municipal boundaries, rather than to take property from one person and give it to another.

v. Waddington, decided in the Mayor's Court of New York City in 1784. This was not only a real case, but a very famous case indeed. The law involved was one of the controversial laws of the time—one of the many confiscation laws passed by the several States against the "Loyalists" or "Tories." It was particularly important because it involved the treaty by which the War of the Revolution was ended and the independence of this country recognized, which then had been but recently signed. No less a person than Alexander Hamilton was one of the counsel, and the judge was a well-known lawyer of his day. This case appears on every list of "precedents" ever compiled, and is usually trotted out as a famous precedent by people who had never even heard of the Symsbury case, for instance, or of Mr. Josiah Phillips and his case. But while the case was both real and important, it is certainly not a precedent for the Judicial Power. In its time the case aroused a great amount of feeling, and the judge who decided was accused of overriding the law. But all of this has nothing to do with our problem, nor does it bear on our subject except in a way the very reverse from that asserted by the "precedent" seekers. actually happened was this:

The case, as already stated, involved our international relations, and threatened to reopen the conflict with Great Britain which had just been closed. The court therefore gave the law in question what may be considered a strained meaning so as to avoid a conflict between the law and the Peace Treaty. This caused a great outcry against the court. Indignation meetings were held, and heated resolutions were passed, not only by these meetings but even by the House of Assembly. In these resolutions it was said that the court had refused to enforce a law of the State or declared it null and void. Hence this case's great reputation among the "precedent"-compilers. But the honest and scholarly Coxe frankly recognizes that if this is a "precedent" at all, it is a precedent against the Judicial Power. Says he:

"While the court did not directly pass upon the nature of conflicts between state statutes and the state constitution, it felt compelled to lay down the law of legislation in terms fully securing the supremacy of the legislature and the subordination of the judiciary. If its exposition of the law was correct, it was certainly a necessary consequence that no court could hold any statute void, because

judicially ascertained by it to be unconstitutional." (Coxe, op. cit. p. 224)

And again:

"What follows the foregoing exposition of federal right is nothing like any claim for judicial competency to hold legislation void because ascertained to be contrary to federal or to constitutional right. The modest claim made on behalf of the judiciary was merely to a judicial discretion within the limits of Blackstone's tenth rule for construing statutes. This was consequently a claim to a judicial discretion confined to matters collateral to the principal matters of a statute in cases unforeseen. In such cases, as the intention of the legislature was not clear, a reasonably judicial presumption concerning the same was rightful. The discretion, which Blackstone claimed for an English court, was asserted for a New York court, but nothing more. Everything more was disclaimed.

"Closely following Blackstone's words and ideas, the court observed: 'The supremacy of the Legislature need not be called into question; if they think fit positively to enact a law, there is no power which can controul them. When the main object of such a law is clearly expressed, and the intention is manifest, the Judges are not at liberty, altho' it appears to them to be unreasonable, to reject it: for this were to set the judicial above the

legislative, which would be subversive of all government.

"But when a law is expressed in general words, and some collateral matter, which happens to arise from those general words is unreasonable, there the judges are in decency to conclude, that the consequences were not foreseen by the legislature; and therefore they are at liberty to expound the statute by equity, and only quoad hoc to disregard it.

"'When the judicial make these distinctions, they do not controul the legislature; they endeavour to give their intention its

proper effect.'

"This is the substance of the authorities, on a comprehensive view of the subject; this is the language of Blackstone in his celebrated commentaries, and this is the practice of the courts of justice, from which we have copied our jurisprudence, as well as the models of our internal judicatories.

"Blackstone's tenth rule for construing statutes in England under an unwritten constitution was thus adopted bodily by a

court of New York under a written constitution. . . .

"The bearing of the law of the opinion upon the case of a conflict between a state statute and the state constitution is obvious. If Blackstone's doctrine was the law of New York, no court could ever reject a statute in order to obey the constitution, although the latter was written. If a court could do so, the law of legislation

would be based upon a denial of Blackstone's doctrine. Thus, if the opinion be correct, the question whether a statute be constitutional or not, could never be a judicial, and must always be an extrajudicial question. All courts must be bound by all statutes of the legislature. . . .

"On the whole matter of the case of Rutgers v. Waddington it is, therefore, correct to say that according to the law of the opinion, no court could decide a questioned statute unconstitutional

and hold it therefore void." (Coxe, op. cit. pp. 230)

The next real case is Trevett v. Weeden, not less famous, either in history or in the "precedent"-lists, than Rutgers v. Waddington. This case was decided in the Courts of Rhode Island in 1786. It was like Rutgers v. Waddington in that it was of great popular interest and related to one of the great controversies of the timethe issue of paper-money by the states, supposed to be one of the reasons for the adoption of the United States Constitution, and certainly the reason for one of its provisions, that which restrains the states from emitting bills of credit. And, like Rutgers v. Waddington, it met with popular disapproval. The judges who decided it were haled before the Legislature, and came very near being removed from office for their decision, and were only saved by a technicality. Four of the five judges who decided the case were actually dropped at the end of the year—the judges in Rhode Island at that time being appointed by the legislature from year to year. If there are any "precedents" at all, this case certainly is entitled to head the list. It is therefore worth our while to take a close look at it.

As already stated, this case involved the controversial subject, paper-money. But that must not be taken to mean that the question of the power of the state to issue paper-money was either questioned or in any way involved in the decision. It is commonly said that the question involved was whether the legislature could pass an act depriving a person of trial by jury. So Prof. Haines, for instance, in his notations on his list, says with reference to this case, as to the question involved: "Summary conviction without a jury"; and as to the decision itself: "Conviction without a jury regarded as contrary to fundamental law."

As a matter of fact there was no such decision; i.e., the court did not hold the law in question unconstitutional either for the reason stated by Prof. Haines or for any other reason. What actually happened was this: In May, 1786, the Legislature of Rhode

Island passed an act providing for the emission of paper-money. This law was naturally unpopular with the propertied classes. There was danger of the law being circumvented, and therefore the legislature, in June of the same year, enacted that any person who should refuse to receive paper-money in exchange for goods on sale at the face-value of the bills should, upon conviction, be fined £100 for the first offense, and for the second offense he should, in addition to being fined, be adjudged incapable of being elected to any office of honor. It seems that the severity of the law was not deemed sufficient to insure its enforcement, if its enforcement be left to the ordinary routine of the courts; and so, in August of the same year, the legislature passed a third law, which provided that offenses against the paper-money statute should be tried by a special court, which was to proceed in the following manner:

"That the said court, when so convened, shall proceed to the trial of said offender; and they are hereby authorized so to do, without any jury, by a majority of the judges present, according to the laws of the land, and to make adjudication and determination; and that three members be sufficient to constitute a court."

Mr. John Weeden, the defendant in this celebrated case, was a butcher. Mr. John Trevett, the plaintiff, offered to Mr. Weeden paper-money for the current price of meat as if it were coin of the realm, which Mr. Weeden refused to accept. Mr. Trevett thereupon brought this action for the fine, which was evidently payable to the informer or aggrieved party. The defendant, in his answer, raised various questions, among them the following: That the law under which he was being tried had expired and was no longer in force; and that it was unconstitutional and void "for that the court is not authorized or empowered by said act, to impanel a jury to try the facts charged in the information, and so the same is unconstitutional and void."

It seems that the case was argued by a very famous lawyer, who afterward himself reported the case in pamphlet form. In his argument this learned lawyer made many points, including the ones mentioned above, and also another point which is of importance in this connection, namely, that the act was impossible of performance within the meaning of Blackstone's rule that laws impossible of performance may be disregarded. This point was argued at great length, the gravamen of the argument being that

the law contains two contradictory provisions, and therefore cannot be carried out by the court—namely, that the court should proceed without a jury and that it should also proceed according to the law of the land. These provisions, argued the astute lawyer, are contradictory, because, on the one hand, the "law of the land" as it is understood in Rhode Island includes trial by jury; while, on the other hand, the law expressly provides for the judges to proceed without a jury. The decision of the court was that it had no jurisdiction, and therefore dismissed the complaint.

For this decision, as already stated, the judges were haled before the legislature to answer for their conduct.

It is not historically known just what the judges said when they appeared before the legislature. It is certain that some of them made speeches which may be variously interpreted. The report extant would indicate that the principal point raised by the judges before the legislature in their defense was not the unconstitutionality of the law in question, but rather that they, as judges, were not answerable to the legislature for what they did, except in cases of impeachment, and also that the legislature was bound by the record of the decision itself, which said nothing about unconstitutionality. In other words, the position of the judges was that while they were answerable for their acts, they could not be asked for any reasons for any decision except as the same may appear in the record. And since the record did not contain any statement to the effect that they had declared any act of the Assembly void, or had refused to enforce any act of the legislature, they could not be called to account for their action in this case.

Much has been made of the alleged arguments of the judges before the legislature upon the unconstitutionality of the law as a proof not only of the fact that the law was actually held unconstitutional, but also of the courage of the judges in upholding their views before the legislature upon whom they were dependent for their positions. But a careful inspection of the report will show that these speeches have been entirely misconceived. The judges never took the position before the legislature that they had declared the law unconstitutional or void. On the contrary, they pointed to the record, which did not contain any such statement. The speeches with respect to the question of constitutionality of the law were made in an entirely different connection, as can be

seen from the following report of Judge Howell's speech. Of Judge Howell the not-unbiased reporter says:

"He observed, that the order by which the judges were before the House might be considered as calling upon them to assist in matters of legislation, or to render the reasons of their judicial determination, as being accountable to the legislature for their

judgment.

"That in the former point of view, the court was ever ready, as constituting the legal counsellers of the State, to render every kind of assistance to the legislative, in framing new or repealing former laws: but that for the reasons of their judgment upon any question judicially before them, they were accountable only to God and their own conscience.

"Under the first head, the honorable gentlemen pointed out the objectionable parts of the Act upon which the information was founded, and most clearly demonstrated, by a variety of conclusive arguments, that it was unconstitutional, had not the force of a law, and could not be executed. His arguments were enforced by many authorities of the first eminence, in addition to those produced upon the trial. But as this part of the subject hath in a great measure been anticipated, we shall not enter into a further detail, concluding that the legal defence of the court, in showing 'that they were not accountable to the legislature for the reasons of their judgment,' will be more interesting to the public:

"Here it was observed, that the legislature had assumed a fact, in their summons to the judges, which was not justified or warranted by the records. The plea of the defendant, in a matter of mere surplussage, mentions the Act of the General Assembly as 'unconstitutional, and so void.' but the judgment of the court simply is, 'that the information is not cognizable before them.' Hence it appears that the plea hath been mistaken for the judg-

ment.

"Whatever might have been the opinion of the judges, they spoke by their records, which admitted of no addition or diminution. They might have been influenced respectively by different reasons, as the whole Act was judicially before them, of which, it being general, they could judge by inspection, without confining themselves to the particular points stated in the plea." (Thayer, Cases on Constitutional Law, Vol. I, p. 76)

It thus appears, upon close examination, that even this great "precedent" is not much of a precedent for the Judicial Power. If anything, it is a precedent, or at least a very cogent argument, against the claim that such such a power was recognized, or such a claim tolerated. That it is not a precedent is clear both from the

record of the case itself, as well as from Judge Howell's speech, in which he specifically said that the statement in the plea that the act in question was "unconstitutional and void" was mere surplussage. We have therefore here the assurance of Judge Howell himself that the question of unconstitutionality was not the ground of decision.

But while the case is not a precedent, it is of great significance. Certainly, if the judges had only exercised a recognized power the legislature would not have dared to hale them before its bar as if they were criminals; and had an insane legislature dared do such a thing, the judges would certainly not have denied their faith, but would have frankly avowed their belief in the power of the judiciary to declare laws unconstitutional. In fact, if such had been at least their own belief they would have said so in the first instance, in deciding the case itself. And it would certainly seem doing scant honor to Judge Howell and his associates to assume that after they had declared a law unconstitutional they cravenly denied the fact when they appeared before the legislature, assuring that body, in cowardly fashion, that the plea of unconstitutionality was mere surplussage. And this cowardice would then be emphasized by Judge Howell's introducing his arguments against the constitutionality of the act by the statement that he was speaking not in his capacity of judge, but in his character of advisor to the legislature in assisting the framing or repealing of laws. The entire proceeding before the legislature furnishes incontrovertible proof of the fact that while the judges considered the law unconstitutional, they did not think that they had the power to disregard it on that account.4

The conclusions reached in the text from an examination of the reported speeches of the judges, are substantiated also by the arguments of the counsel, General Varnum, who represented the plaintiff in the case and also represented the judges before the Legislature, and who reported the case—his report being, practically, our only source of information as to the actual occurrences. In the course of his argument Mr. Varnum quoted the following from Locke:

"Whenever the legislators endeavor to take away and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people. . . . When the legislators act contrary to the end for which they were constituted, those who are guilty, are guilty of rebellion."

And then he said, on his own account:

"But as the Legislative is the supreme power in government, who is to judge whether they have violated the constitutional rights of the people?—I answer, their supremacy (consisting in the power of making laws agreeably to their appointment) is derived from the constitution, is subordinate to it, and therefore, whenever they attempt to enslave the people, and carry their attempts into execution, the people

We now come to the last case on the list—Bayard v. Singleton, decided in North Carolina in 1787. There is considerable doubt as to whether the Framers of the Constitution knew of the existence of this case at the time of framing, since it happened so near in point of time that it is hardly likely for the information to have reached Philadelphia. However, this question is unimportant. If what we have said before be correct, the decision of this case, single-handed, could not of course have influenced the action of the Constitutional Convention, even if known to them. The case is interesting, nevertheless, as indicating contemporary opinion.

In this respect, it should be noted first of all that the case was denounced vehemently when it became known; among others by one of the best known Framers. Of course it had its defenders, among them James Iredell, subsequently one of the Associate Judges of the United States Supreme Court, who was leading counsel in this case. Much has been made by "precedent"-seekers of the decision in this case. It has been heralded far and wide as one of the cases in which the judiciary stood up for the protection of constitutional rights, protecting the minority against the tyranny of the majority. And it may be admitted that there is probably more justification for that claim in this case than in any of the others, not excluding Trevett v. Weeden. Like Trevett v. Weeden, it is a real case—i.e., a case in which questions of constitutionality were at least raised. And it is the only case for which the claim may be plausibly made that a constitutional question was actually decided. Excepting, of course, Rutgers v. Waddington; in which, however, the decision was the wrong way, from

themselves will judge, as the only resort in the last stages of oppression. But when they proceed no farther than merely to enact what they may call laws, and refer those laws to the Judiciary Courts for determination, then, (in discharge of the great trust reposed in them, and to prevent the horrors of civil war, as in the present case) the Judges can, and we trust your Honours will, decide upon them. . . . Let the question then fairly be stated. Then General Assembly have made a law, and directed the Judges to execute it by a mode of trial repugnant to the constitution. What are the judges to resolve?-Did the nature of their jurisdiction admit of such a mode of trial at the times of their appointment and taking the oath of office?—Surely it did not. The Act of Assembly then erects a new office, the exercise of which, other things being equal, they may undertake or refuse, at their own option. There is no duty, no obligation in the way. In refusing, they incur no penalty; nor can their so doing work a forfeiture of their offices as Judges of the Supreme Judiciary Court. But when it is considered that the exercise of this office would be acting contrary to their oath of allegiance, and the oath of office, they are bound to reject it, unless the General Assembly have power to absolve them from their oaths and compel them to accept of any appointment they may be pleased to make." (The Case Trevett v. Weeden. Providence, 1787)

the point of view of the "precedent"-seekers. But upon closer scrutiny it will be found that, while it is in somewhat better condition as a "precedent" than Trevett v. Weeden, it is still a precedent for very little.

To begin with, it is like Trevett v. Weeden in that no opinion deciding a law unconstitutional was given, although a law was certainly disregarded. In the second place it should be noted that the law thus disregarded was not a general law, but a special law affecting a special class of suitors. And thirdly—and this is the most important point—that the law in question was not a law affecting rights generally, but a law concerning judicial procedure. Such a law could be disregarded by courts who claim no right to disregard general laws,—on the ground that, under a constitution providing for the separation of power, the judiciary have a right to decide what they will and what they will not take cognizance of. In other words, an independent judiciary may very well claim that, although the courts may be bound to enforce the laws as made by the legislature whenever these laws came before them in the adjudication of cases, the legislature may not prohibit the judiciary from taking cognizance of any justiciable matter. And this is exactly what happened in this case.

Like Rutgers v. Waddington, this case involved the question of "war legislation confiscating Tory estates,"-North Carolina having passed a confiscation act in common with the other states, which confiscated the estates of the Loyalists or Tories. Under this act the confiscated estates were turned over to commissioners who were empowered to sell them, and who did sell them to various people. After the close of the Revolutionary War and the conclusion of the treaty of peace with Great Britain, numerous suits were brought by descendants or grantees of the original owners for the reclamation of these estates. The present action was one of these suits, and attracted wide attention because it was in the nature of a test case. The confiscation laws were not involved, however; at least, not in the decision. The act involved had nothing to do with title to the confiscated property as such, but merely with court procedure concerning litigation over it. It seems that in order to protect those who derived their title from the commissioners of confiscated estates, the legislature of North Carolina passed a law that whenever a suit in ejectment be brought and the defendant should file an affidavit that he held his title by

grant of the confiscation commissioners, the complaint should be dismissed on motion without any further hearing or trial. It seems that under this act the mere filing of the affidavit was sufficient not only to prevent a trial upon the merits, but that the court could not even examine into the truthfulness of the affidavit itself. It was this statute that was involved in this case. The action first came up in May, 1786, and the attorney for the defendant moved for a dismissal of the complaint without a trial,—the defendant having filed the required affidavit stating that he held by grant from the confiscation commissioners. The court then heard argument, but made no decision. It is reported, however, that one of the judges made some remarks concerning "those fundamental principles comprised in the constitution dividing the powers of government into three separate and distinct branches, to wit, legislative department, judicial department, and executive department, and assigning to each several and distinct powers, and prescribing their several limits and boundaries," but that he said this "without disclosing a single sentiment upon the cause of the proceeding, or the law introduced in support of it." (Thayer, Cases on Constitutional Law, Vol. 1, p. 79)

In May of the following year (1787) counsel for the defendant renewed the motion to dismiss, and this produced a very lengthy debate from the bar.

"Whereupon,—says the report—the court recommended to the parties to consent to a fair decision of the property in question, by a jury according to the common law of the land, and pointed out to the defendant the uncertainty that would always attend his title, if this cause should be dismissed without a trial; as upon a repeal of the present Act (which would probably happen sooner or later), suit might be again commenced against him for the same property, at the time when evidences, which at present were easy to be had, might be wanting. But this recommendation was without effect."

The court then proposed another mode of settlement of the dispute, which proved equally futile. The report then proceeds as follows:

"The court then, after every reasonable endeavor had been used in vain for avoiding a disagreeable difference between the legislature and the judicial powers of the State, at length with much apparent reluctance, but with great deliberation and firm-

ness, gave their opinion separately, but unanimously, for overruling the aforementioned motion for the dismission of the said suits."

The reporter then proceeds to give the reasons which the court is supposed to have assigned for this decision, namely, that the legislature could not take away a citizen's right to a trial with respect to his property in accordance with the law of the land.

The case was thereupon tried and the defendant got the verdict.

Two things are clear from the foregoing:

First—that no general law was involved in the case, but a special law which the court evidently thought invaded its rights as a court under the constitution, in the distribution of the powers of government. Not only did this case not involve the confiscation laws as such, but it did not even involve the question of trial by jury, which it is commonly alleged to have involved. For the question was not whether a trial ought to be with or without a jury, but whether there should be a trial at all—that is to say, whether the judges had a right to hear the case. And one need not be a supporter of the Judicial Power in any of its formulations in order to believe that the Judiciary have a right to hear and determine cases. One need not be a supporter of the Judicial Power in order to believe that the Legislature may not abolish all courts when the constitution provides for their existence. It is manifestly one thing to say that the courts are to administer the laws made by the legislature, and quite another to say that the courts must disband when so ordered by the legislature. And the same reasoning may well be claimed to apply to a statute which prevents the courts not only from determining but even from hearing a certain class of cases. It may very well be claimed with a good show of reason that such an act of the Legislature was a revolutionary act, an attempt to abolish the Constitution by depriving the Judiciary of its rightful function of hearing cases; which may well be countered by the Judiciary with another revolutionary act, that of disobeying the mandate of the Legislature. We shall see further below, that that was in fact the theory of the Judicial Power held by those framers of the Constitution, and their contemporaries, who favored the Judicial Power. It goes without saying that the claim that a revolutionary act on the part of the Legislature may necessitate or justify an equally revolutionary act on the part of the Judiciary is on an entirely different plane from the claim that in the ordinary

course of government the Judiciary has the right to set aside legislative enactments, passed in due form, when its interpretation of the Constitution differs from the interpretation placed upon it by the Legislature.

As already stated, this case—which was known in the literature of the time as the Newbern Case—caused a great controversy between two political leaders, and people naturally took sides. Those who supported the decision supported the reasoning which is outlined above; while those who opposed it claimed that even if the Legislature were to clearly and manifestly violate the Constitution, no court could, or should, have the power to disregard the clearly expressed mandate of the Legislature as the Legislature is responsible to the people only, and for the time being embodies the supreme will of the people. To disregard the will of the Legislature would, therefore, "be subversive of all government," as was said by the learned judge who decided the case of Rutgers v. Waddington.

This exhausts the list of cases bearing on the subject. But we cannot leave the subject of "precedents" without adverting to the great speech which James Otis made in 1761 in the famous case of the Writs of Assistance. Ordinarily, one would not refer to a lawyer's speech as proof of law, or as a "precedent" of any kind. Lawyers, in a certain class of murder cases, frequently appeal to the so-called "unwritten law." But no one would consider the "unwritten law" an actual law for that reason, or cite it as a precedent in a legal argument. But Otis is usually trotted out by the supporters of the Judicial Power whenever the question of "precedent" is under discussion. Not by all, of course. The scholarly Coxe, for

The most important of the contemporary documents with respect to Bayard v. Singleton was an exchange of letters between James Iredell, later an Associate Justice of the United States Supreme Court, and Richard Dobbs Spaight, one of the Framers. In a letter written from Philadelphia while he was attending the Constitutional Convention, Spaight said:

"I do not pretend to vindicate the law which has been the subject of controversy; it is immaterial what law they have declared void; it is their usurpation of the authority to do it, that I complain of, as I do positively deny that they have any such power. . . . It would have been absurd, and contrary to the practice of all the world, had the constitution vested such power in them, as would have operated as an absolute negative on the proceedings of the legislature, which no judiciary ought ever to possess, and the state, instead of being governed by the representatives in general assembly would be subject to the will of three individuals, who united in their own persons the legislative and judiciary powers, which no monarch in Europe enjoys, and which would be more despotic than the Roman decemvirate, and equally insufferable."

instance, ignores him utterly. But Professor Haines takes him very seriously. On page 52 of his book Prof. Haines says:

"The doctrine of Coke was perhaps definitely and positively introduced into the law of the colonies by James Otis in his well-known argument on the Writs of Assistance, February, 1761. In opposing general search warrants, sanctioned by an act of Parliament, Otis maintained that reason and the Constitution were both against this kind of writ. In the argument of Otis the doctrine of judicial supremacy was not only strongly asserted, but it was also thereby made an issue of significance to all the colonies in their resistance to the home government."

This is a strong statement, and one would naturally expect some supporting proof in a learned work by a learned author. But no such proof is vouchsafed us by Professor Haines. And the known facts are quite to the contrary. At least, as far as the most important part of the statement is concerned—namely, that Coke's statement was definitely and positively introduced into the law of the colonies by James Otis. The only way a doctrine becomes part of law is by its being embodied in judicial decisions. Unless, of course, it is embodied in some legislative enactment; and of this there is no claim. But we have already seen that there is not a single decision during the entire colonial period in which this doctrine had been embodied. It is therefore to be taken for granted that this doctrine was no more part of "the law of the colonies" after Otis' speech than before it.

It is also worthy of note in this connection that the case in which this doctrine is supposed to have been asserted, as a preliminary to its being "definitely and positively introduced into the law of the colonies," went against Otis, the decision of the court being in favor of issuance of the Writs of Assistance. If, therefore, the case of the Writs of Assistance is to be regarded at all as a "precedent," it certainly is a very strong precedent against the prevalence of the doctrine in colonial times.

But even this is not all. As a matter of fact, the doctrine of the Judicial Supremacy was neither "strongly asserted" in Otis' speech, nor "thereby made an issue of significance to all the colonies in their resistance to the home government."

More than that: The question of Judicial Supremacy was not even a significant issue in the case in which Otis made his speech. And for the simple reason that, contrary to Prof. Haines' assurance,

general Writs of Assistance were not sanctioned by any act of Parliament.

We have no less an authority than James Otis himself for this proposition. In fact, that was Otis' principal point in his great argument; although he did, incidentally, say that if there were such an act it would be unconstitutional. The truth is that in the passage quoted above, Prof. Haines gives us a new reading of American History,—a reading almost as startling as the declaration of the learned committee of the New York State Bar Association that the American Revolution was a lawyers' revolution designed to enthrone on this continent Lord Coke's doctrine of Judicial Supremacy. For the significance of Otis' speech was not its legal learning or any legal or governmental doctrine therein announced, but the clarion call of revolt which it sounded. Not, however, a revolt on behalf of the judiciary against Parliament, but on behalf of the American colonies against the British government,—and particularly against the British Government as represented by the King and the courts, if any part of that government is at all to be singled out for special attention. In order that the true significance of the Otis speech be understood, a few of the facts must be stated in connection with that case as well as Otis' famous speech.

To begin with, as already stated, there was no act of Parliament for the issuance of General Writs of Assistance; and the claim of the lawyers for the Crown when they applied for the writs in question was that their issuance was sanctioned by English court precedents, namely, the English Court of Exchequer. It is true that in the course of the argument of the lawyers for the Crown, as that argument comes to us in fragmentary fashion, one of them is reported to have tried to show, by a very involved process of reasoning, that to refuse the writ applied for would be flying in the face of an act of Parliament. But the counsel who opposed the issuance of this writ, including Otis, countered this point by showing that this claim was utterly unfounded, and that the practice of the Exchequer Court was not sanctioned by any act of Parliament. The only authority which counsel for the Crown could produce, as to which there could be no question, was one judicial precedent. And it was evidently on the strength of this "precedent" that the writ was allowed by the American court. It was therefore only natural that Otis should concentrate his attack upon

this "precedent," and not on any act of Parliament. And a reading of his speech in the form in which it has reached us shows that that was actually what he did, and that the reference to acts of Parliament against the constitution being void was only incidental, and merely a flight of oratorical fancy.

That that statement was bad law when made, is now beyond question. And we have the highest authority for asserting that even the alleged authorities mentioned by Otis,—namely, Coke, Hobart, and Holt,—were not particularly well used by him. This authority is no other than the great Massachusetts jurist, Horace Gray, for many years an Associate Justice of the United States Supreme Court, and, incidentally, the editor of Otis' speech in Quincy's Reports. In an appendix to Quincy's Reports, Judge Gray says:

"But Otis, while he recognized the jurisdiction of Parliament over the Colonies, denied that it was the final arbiter of the justice and constitutionality of its own acts; and relying upon words of the greatest English lawyers, and putting out of sight the circumstances under which they were uttered, contended that the validity of statutes must be judged by the courts of justice." (Thayer, Cases, Vol. 1, p. 48: Quincy's Rep. appx. 1, 520)

And now about the celebrated speech itself:

It should be noted, first of all, that there is no contemporaneous report of the speech, and that our main reliance is a report, made in his old age, by John Adams, who, as a young man, had heard the speech, and had taken some notes of the same,—a slim reliance, surely, to be made the basis of anything more than a general characterization. But such as it is, it is nevertheless very interesting, although in an entirely different way from that asserted by Prof. Haines and the other seekers after precedents in support of the Judicial Power. For this account proves that, whatever the doctrine asserted, it was actually considered revolutionary by the speaker himself, and was so understood by his hearers.

Otis began by saying:

"I take this opportunity to declare, that whether under a fee or not (for in such a cause as this I despise a fee) I will to my dying day oppose with all the powers and faculties God has given me, all such instruments of slavery on the one hand, and villany on the other, as this writ of assistance is." He then proceeded as follows:

"It appears to me the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law-book. . . .

"In the first place, may it please your Honors, I will admit that writs of one kind may be legal; that is, special writs, directed to special officers, and to search certain houses, etc., specially set forth in the writ, may be granted by the Court of Exchequer at home, upon oath made before the Lord Treasurer by the person who asks it, that he suspects such goods to be concealed in those very places he desires to search. The act of 14 Charles II. which Mr. Gridley mentions, proves this."

Then follows the main body of the argument, which is directed to proving that the general writ applied for is different from the special writs which are proper, and showing the enormity of general writs as an instrument of oppression. After having denounced these writs in unmeasured terms, Otis concluded his speech as follows:

"Let us see what authority there is for it. Not more than one instance can be found of it in all our law-books; and that was in the zenith of arbitrary power, namely, in the reign of Charles II., when star-chamber powers were pushed to extremity by some ignorant clerk of the exchequer. But had this writ been in any book whatever, it would have been illegal. All precedents are under the control of the principles of law. Lord Talbot says it is better to observe these than any precedents, though in the House of Lords, the last resort of the subject. No Acts of Parliament can establish such a writ; though it should be made in the very words of the petition, it would be void. An act against the constitution is void. (vid. Viner.) But these prove no more than what I before observed, that special writs may be granted on oath and probable suspicion. The act of 7 & 8 William III., tht the officers of the plantations shall have the same powers, etc., is confined to this sense; that an officer should show probable ground; should take his oath of it; should do this before a magistrate; and that such magistrate, if he thinks proper, should issue a special warrant to a constable to search the places. That of 6 Anne can prove no more."

Two points are clear from this speech. First, that the attack was not upon an act of Parliament, but upon a court precedent in favor of a court writ to be used by the minions of the King—his revenue officers. His declaration that acts of Parliament against the "constitution" were void was a mere oratorical flight, to be

taken no more seriously than his assertion that if the writ had been found in all of the law books it would still be illegal.

Second, that the real meaning of the speech did not lie in any legal or existing constitutional doctrine announced, but in the defiance of the British Government and the spirit of revolt against the existing order which it showed. That this was the meaning attached to it by his hearers is proven by all accounts which have reached us, including that of John Adams, which is the main source of our information on this entire subject.

Here is what John Adams' biographer says of the speech and of the effect which it produced on John Adams:

"It was in 1761 that Otis delivered his daring and famous argument against the writs of assistance. This was the first log of the pile which afterward made the great blaze of the Revolution John Adams had the good fortune to hear that bold and stirring speech, and came away from the impressive scene all aglow with patriotic ardor. The influence of such free and noble eloquence upon the young man was tremendous. As his son classically puts it: 'It was to Mr. Adams like the oath of Hamilcar administered to Hannibal.' He took some slight notes of the argument at the time, and in his old age he proved the indelible impression which it had made upon him by writing out the vivid story. His memoranda, though involving some natural inaccuracies, constitute the best among the meagre records of this important event. He said afterward that at this scene he had witnessed the birth of American Independence. 'American Independence was then and there born. The seeds of patriots and heroes, to defend the non sine dis animosus infans, to defend the vigorous youth, were then and there sown. Every man of an immense, crowded audience appeared to me to go away, as I did, ready to take arms against the writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In fifteen years, i.e., in 1776, he grew up to manhood and declared himself free.' Such impassioned language, written in the tranquillity of extreme age, nearly three-score years after the occurrence, shows what feelings were aroused at the time. The seed which Otis flung into the mind of this youth fell upon a sufficiently warm and fertile soil." (John Adams-J. T. Morse; American Statesmen series, page 23)

CHAPTER V

EXPERIENCES WITH COURTS AND THE OPINIONS OF PHILOSOPHERS

UR excursion with Coxe into Continental European systems of law from the Roman Empire to modern times, and our investigation of English and American "precedents," have shown that with the single exception of the English case of Godden v. Hales (if that may be called an exception), there is no record of any court ever having declared a law of its own sovereignty void for unconstitutionality. Godden v. Hales was concededly erroneous as well as tyrannous, and was speedily and emphatically reversed in such a manner that the doctrine there announced has never been heard of in England since. We have also seen that Mr. Coxe's own modest claim at the end of his Historical Introduction was merely that the power in question was "not unknown" to the Framers of the United States Constitution when they met in Philadelphia in the summer and fall of 1787. Clearly, this is a slim basis for the assertion that the Framers actually intended to put it into the Constitution. Many things were not "unknown" to the Framers which were not embodied in the Constitution. The laws of the Medes and Persians were probably "not unknown" to the Framers, but no one claims that any of the institutions of those two great ancient nations found their way into our Constitution. We know as a fact that the institutions of the ancient Greeks and Romans, and those of the medieval Roman Empire and of the medieval and modern Italian republics, were well known to the leading men among the Framers of the United States Constitution; but we also know that none of these institutions were embodied in that Constitution. Evidently, merely being not unknown to the Framers was an insufficient qualification for an institution to commend itself for their adoption. As is only natural, an institution had to be favorably known to them, or at least to a majority of them, in order to be adopted. Was the Judicial Power in that category? That is the

real question which the supporters of the Judicial Power should answer. That is exactly what the supporters of the Judicial Power are trying to do when they claim that this power was "well recognized" in the jurisprudence of the time, and when they seek for precedents to prove their claim. But, as we have seen, that assertion is utterly unwarranted, and the search for precedents utterly futile. Under these circumstances, the power not being unknown is rather an argument against the probability of its being embodied in the Constitution. For, when a known power is neither used nor expressly provided for, that is at least some indication that it is not very favorably considered. That non-user is in itself an argument against the existence of a governmental power, has been declared by no less an authority than the United States Supreme Court itself.

We could therefore very well leave the subject to rest right here, since the burden of proof is certainly on the supporters of this power. It is for them to prove that the Judicial Power was intended to be embodied, and actually was embodied, in the Constitution; and not for those who oppose it to prove the negative. But we are ready to assume the laboring oar, and to prove affirmatively that, as a matter of fact, the historical experience with courts and judges with which the Framers were most familiar was such as to cause them to look quite unfavorably at the interference of courts in governmental matters; that government by judges was decidedly distasteful to them; and that nothing in their general philosophy of government was in any way calculated to counteract it.

Of all books, the Bible was most familiar to the Framers, and its influence upon the thought of their ancestors for many generations past is undoubted. The Bible was, therefore, their only source of information as to an historically authentic Government by Judiciary. According to this account, the Chosen People, after receiving their Law on Mt. Sinai, proceeded to establish a Government by Judiciary; and thereafter, upon their settlement in the Promised Land, they were governed by judges for quite a considerable time. And the results of the experiment are also told in the Bible. According to that authority, the Jews one day decided that they wanted a king, and asked the prophet Samuel to provide them with one; and our readers will probably recall the great efforts which the prophet made to dissuade them from that under-

taking, as well as the futility of his efforts.¹ In vain his warnings that the king would ill-use them in all kinds of ways; after all these warnings they still insisted on having a king. Their experience with government by judges was evidently such that no tyranny of a mere king held any terrors for them—an opinion of judicial tyranny since approved by members of the United States Supreme Court.

And the experience of the ancient Hebrews was not the only history that held a warning to the framers of the United States Constitution. The history of England, which was their own history, held another, and quite as serious a one. A study of English history is not calculated to give courts and judges a particularly favorable character as far as government is concerned. There was, for instance, the great case of Godden v. Hales, beloved of searchers for "precedents." We have read Macaulay's account of it, and Coxe's opinion of the case, its meaning and consequences. We know that case was equally discreditable to the judges from the point of view of politics as well as from that of law and history. Mr. Coxe's statement that this decision was "erroneous when made," puts the case rather mildly. As a matter of fact, the decision was a libel on the law of England, and the "precedents" relied upon by the judges almost pure fabrications.² And all of

"But the people refused to listen to the voice of Samuel, and said, 'No, but there

shall be a king over us." (First Book of Samuel, 8, 11-20.)

As to the precedents relied upon by the judges in Godden v. Hale see Appendix A, infra, at end of Vol. 1. The true condition of the law of England on the subject is stated thus by the eminent legal historians, Pollock, Maitland, and Holdsworth:

take your sons and appoint them for himself for his chariots and for his horsemen; and they shall run before his chariots; and he will appoint for himself commanders of thousands and commanders of hundreds, and some to do his plowing and to reap his harvests and make his implements of war and the equipment for his chariots And he will take your daughters for perfumers, for cooks and for bakers. And he will take the best of your fields and your vineyards and your olive orchards, and give them to his servants. And he will take the tithe of your grain crops and of your vineyards and give it to his eunuchs and to his servants. And he will take your menservants and your maidservants, and the best of your cattle and your asses, and make use of them for his work. He will take a tenth of your flocks; and you yourselves will become his slaves. Then you will cry out in that day because of your king whom you will have chosen for yourselves; but the Lord will not answer you in that day.'

[&]quot;It was a current opinion among the medieval doctors that rules of positive municipal law were controlled by the law of nature, and not binding if they were contrary to it; though some advocates of the Emperor's independent authority in secular matters, as against the claim of universal supremacy for the Pope, avoided inconvenient consequences by tempering the general proposition with a rather strong presumption that the acts of the lawful sovereign were right. Opposition to princes and rulers in vindication of the law of nature was possible, but at the opposer's peril if he were mistaken, and not to be lightly entered upon. So limited,

this false law was used by the judges in the interest of kingly prerogative and the oppression of the people. No wonder it produced a revolution. But we should very much wonder if it made the Framers look favorably upon the Judicial Power.

And this was not the only case that produced a revolution in England. The Great Revolution of 1640 was also produced by a court decision—a decision even more infamous than Godden v. Hales—the Ship Money case. It is rather curious that the searchers after "precedents" fail to mention this famous case, which was certainly at least as good a precedent as any; in fact, better than any other with the exception of Godden v. Hales. In this case also, "some of the judges who pronounced sentence... denied the power of Parliament to limit the high prerogative of the Crown," just as in Godden v. Hales. And it was just as good a revolution maker—for it produced the Great English Rebellion, almost exactly half a century earlier.

The English people also had the bitter experience of the Court

this natural right can hardly be distinguished from the ultimate moral right, admitted by all modern publicists, of resisting an intolerably bad government. However, the doctrine without its politic qualification found an echo in England, where the king's judges always looked on legislative interference with some jealousy—a jealousy too often warranted by the unworkmanlike manner in which Parliament has laid hands on the Common Law. We find a series of dicta, extending to the early part of the eighteenth century, to the effect that statutes contrary to "natural justice" or "common right" may be treated as void. This opinion is most strongly expressed by Coke, but, like many of his confident opinions, is extra-judicial. Although Coke was no canonist, we may be pretty sure that it was ultimately derived from the canonist doctrine prevailing on the Continent of Europe. In England it was never a practical doctrine. The nearest approach to real authority for it is a case of the 27th year of Henry VI., known to us only through Fitzherbert's abridgement, where the court held an Act of Parliament to be inoperative, not because it was contrary to natural justice, but because they could make no sense of it at all. . . . At this day the courts have expressly disclaimed any power to control an Act of Parliament. Blackstone characteristically talks in the ornamental part of his introduction about the law of nature being supreme and, when he comes to particulars, asserts the uncontrollable power of Parliament in the most explicit terms, following herein Sir Thomas Smith, a civilian whose political insight was much greater than that of the common lawyers of his time." (Pollock, Expansion of the Common Law, pp. 121-122.)

"It is always difficult to pin Coke to a theory, but he does seem distinctly to claim that the common law is above statute, and above prerogative—it assigns a place to both king and parliament. . . . If this theory had been generally accepted the judges would have become the ultimate lawgivers of the realm—in declaring law they would have made law, which they would have upheld even against statute. . . Such language is far too vague to become a constitutional theory, and looking back at the statute book of the fourteenth, fifteenth and sixteenth centuries, it was indeed difficult to find any matter with which parliament had not meddled. The vigorous legislation of our medieval parliaments had rendered any theory of law above king, above king and parliament, an unworkable doctrine. It soon perished; year by year events showed that the struggle lay between sovereignty of king, and sovereignty of king in parliament. A poor relic of the theory lives on in Blackstone—the judges, he seems to think, might hold a statute void if it contravened the law of nature, but by Blackstone's day this had become an impracticable speculative

of Star Chamber and of Chief Justice Jeffrys and his Bloody Assizes. Probably no name in English history is more scorned and hated than that of Chief Justice Jeffrys, and deservedly so. And the name of the Court of Star Chamber has become a synonym in the English language for everything underhanded, sinister, and cruel; and its reputation as an instrument of government abhorrent to all free men is second only to that of the Holy Inquisition itself.

We need only add here that the first assertion of the Judicial Power in England was under the first Stuart. That its first use (or attempted use) was under the second Stuart. That it completely disappeared under the Commonwealth. That it was revived again upon the restoration of the Stuarts, as its most efficient instrument of oppression. And that it again disappeared completely with the abolition of absolutism in England by the Glorious Revolution. Surely, such a history was not calculated to recommend Lord

tenet, and we may fairly say that it was destroyed by Bentham." (Maitland, The Constitutional History of England, pp. 300-301.)

What might be called the official view of modern English judges on the subject was thus stated by Mr. Justice Willes in Lee v. Bude and Torrington Junction Railway Co., decided in 1871 (L. R. 6 C. P. 576, 582):

"I would observe, as to these Acts of Parliament, that they are the law of this land; and we do not sit here as a court of appeal from parliament. It was once said—I think in Hobart—that if an Act of Parliament were to create a man judge in his own case, the court might disregard it. That dictum, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by parliament with the consent of the Queen, lords and commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it; but so long as it exists as law, the Courts are bound to obey it. The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them."

[&]quot;Moreover, this doctrine of the supremacy of the law became a far more practically workable principle by reason of its connection with Parliament. Abroad, as we shall see, the doctrine seemed to take the form of the supremacy of a fundamental law which no power in the state could change, and only the lawyers could interpret. In England, at the close of the Middle Ages it was coming to mean the supremacy of a law which Parliament could change and modify; and because the lawyers worked in alliance with Parliament they rarely showed any desire to question the power of Parliament to make, change, or modify the law. The dicta of Coke in Bonham's Case, to the effect that the courts may pronounce to be void such Acts of Parliament as are unreasonable or impossible to be carried into effect, are founded upon very little medieval authority. . . . In fact, such dicta were really contrary to the principles of the common law as understood by Coke himself and other lawyers of the parliamentary school. The cases which Coke cites really only amount to decisions that the courts will, as a counsel of Edward III.'s reign expressed it, interpret statutes "stricti juris." They will interpret them, that is, so as to give them a meaning in accordance with established principle, and they cannot give any effect to them if they are meaningless. These are principles of interpretation which would be accepted at the present day. . . . Thus we may say that at the end of this period the legislative supremacy of Parliament is fully recognized." (Holdsworth, History of English Law, Vol. 2, pp. 441-444.)

Coke's famous theory of government to the favorable consideration of the framers of the United States Constitution.

That this period of English history, and the connection of the courts therewith, was fresh in the memory of the Revolutionary Patriots is proven by one of the "precedents" themselves—James Otis' great oration, which we have already had occasion to discuss. We have previously called attention to those portions of Otis' speech which showed that it is quite erroneously cited as a precedent. We shall now quote some other portions of that speech which show that, whether or not Otis was a great authority on law, he certainly was a good student of history, at least of English history, and particularly those parts of English history which interest us here. For in his speech Otis says:

"I argue with the greater pleasure, as it is in favor of British liberty, at a time when we hear the greatest monarch upon earth declaring from his throne that he glories in the name of Briton, and that the privileges of his people are dearer to him than the most valuable prerogatives of his crown; and as it is in opposition to a kind of power, the exercise of which, in former periods of English history, cost one King of England his head, and another his throne."

That Otis knew that it was the Ship Money case that cost Charles I his head, and that Godden v. Hales cost James II his throne, goes without saying. But, as if to emphasize the fact that in his mind these matters were intimately connected with courts and judges, Otis proceeds to declare:

"Not more than one instance can be found of it in all our law books; and that was in the zenith of arbitrary power, namely, in the reign of Charles II, when star-chamber powers were pushed to extremity by some ignorant clerk of the exchequer."

And to cap the climax, and keep the hateful memory of oppressive courts green in the minds of our Revolutionary Fathers, the court thus addressed by Otis proceeded to follow the one single precedent which the lawyers for the English Crown could cite from the reign of Charles II, and issued the writ against the issuance of which Otis had so eloquently argued. As we know, this imitation by an American Court of its English predecessors in making itself an instrument of tyranny, cost Great Britain its American Empire, led to the independence of these United States, and to the adoption of the United States Constitution.

It would therefore require unusually strong proof—in fact, nothing less than a clear and explicit statement in the Constitution itself—to warrant the assertion that the Framers of the United States Constitution deliberately established government by judges in the United States, after an attempt to establish it had been decisively defeated in England by that Glorious Revolution which cost James II his throne and forever abolished the Court of Star Chamber—so that it now survives only as a hateful memory and a term of opprobrium.

And the lessons from English history could only be emphasized by the writings of the great philosophers on politics and government with which our Revolutionary Fathers were familiar, and whose guidance they were following in establishing our form of government. Of course, these philosophers do not discuss government by judiciary as such, since government by judiciary as an actual experiment was utterly unknown to them, except for the Biblical story of the case of the Chosen People, which the modern philosophers did not take as having any practical bearing on the problems of government in the modern world. But these philosophers did say many things which bore directly on the subject, and which could only lead to a negative result as far as the intentional establishment of government by judiciary in the United States is concerned.

To begin with, there were the French philosophers, with Montesquieu at their head. We have seen some of the French experiences in this line, and we know the lessons which the French philosophers derived from the history of France in this regard. Montesquieu's political doctrine was not based, however, on French experience only, but on a combination of French and English experience; the French experience under the Ancient Régime providing mainly the warnings of what not to follow, while the English governmental practice since the Glorious Revolution furnished the model to be followed by every enlightened government.

We know that this led him to accentuate the separation of powers, which became a sacred dogma with him and the other French philosophers. We also know that to them the separation of powers was the antithesis of the Judicial Power, and that when they got a chance at constitution-making they expressly prohibited judicial interference with legislative enactments. They thus banned the American Doctrine by anticipation. It is true,

of course, that the French constitution of 1791 containing this ban was not yet in existence when the United States Constitution was framed in 1787. But the French theories which were embodied in the French constitution of 1791 were already in existence. The two constitutions are practically contemporaneous. And while revolutions may be sudden, the processes of thought which lead to the embodiment of theories of government in written constitutions are necessarily of slow growth, requiring time to mature. We know that the French political philosophy which went into the constitution of 1791 developed long before the French Revolution. And we also know that this philosophy had great influence on our Revolutionary Fathers, or at least the most thoughtful among them.3 This is even more true of the English philosophers of the period of the English Revolution. Our Revolutionary Fathers were quite familiar with them and held them in high esteem. Here is what some of them had to say on the subject of government:

"As an estate in trust—says Harrington—becomes a man's own if he be not answerable for it, so the power of a magistracy not accountable to the people from whom it was received, becoming of private use, the commonwealth loses her liberty. Wherefore the right of supreme judicature in the people (without which there can be no such thing as popular government) is confirmed by the constant practice of all commonwealths." (Oceana (1656); Works (3d ed.) 155, 158)

And again:

"Where the people are not overbalanced by one man, or by the few, they are not capable of any other superstructures of government, or of any other just and quiet settlement whatsoever, than of such only as consists of a senate as their councillors, of themselves or their representatives a sovereign lords, and of a magistracy answerable to the people, as distributors and executioners of the laws made by the people. And thus much is of absolute necessity to any or every government, that is or can be properly called a commonwealth." (The Art of Law Giving (1659), 393)

³ Prof. John Dickinson is of the opinion that the French philosophers outside of Montesquieu had no great influence on our revolutionary fathers. The point is rather difficult to establish, and Prof. Dickinson may be right—probably is right in so far as direct influence is concerned. However, Montesquieu's influence is undoubted, and for our purpose that is quite sufficient. The author takes this opportunity to thank Prof. Dickinson, who has read portions of this work in manuscript, for his kind interest and valuable suggestions.

If Harrington had any influence at all on the Framers of the United States Constitution, they certainly did not turn over the supreme power in the government—that power which Judge Baldwin calls the "supreme authority"—to a body of men appointed for life and entirely unaccountable to the people.

And Locke, whose influence upon the Framers is undoubted, said:

"And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society to submit to the determination of the majority, and to be concluded by it; or else this original compact, whereby he with others incorporates into one society, would signify nothing, and be no compact if he be left free and under no other ties than he was in before in the state of nature. . . .

"Though in a constituted commonwealth standing upon its own basis and acting according to its own nature—that is, acting for the preservation of the community—there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate, yet the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them. . . .

"In all cases whilst the government subsists, the legislative is the supreme power. For what can give laws to another must needs be superior to him, and since the legislative is no otherwise legislative of the society but by the right it has to make laws for all the parts, and every member of the society prescribing rules to their actions, and giving power of execution where they are transgressed, the legislative must needs be the supreme, and all other powers in any members or parts of the society derived from and subordinate to it. . . .

"The old question will be asked in this matter of prerogative, 'But who shall be judge when this power is made a right use of?' I answer: Between an executive power in being, with such a prerogative, and a legislative that depends upon his will for their convening, there can be no judge on earth. As there can be none between the legislative and the people, should either the executive or the legislative, when they have got the power in their hands, design, or go about to enslave or destroy them, the people have no other remedy in this, as in all other cases where they have no judge on earth, but to appeal to Heaven; for the rulers, in such attempts exercising a power the people never put into their hands, who can never be supposed to consent that anybody should rule over them for their harm, do that which they have not a right to

do. And where the body of the people, or any single man, are deprived of their right, or are under the exercise of a power without right, having no appeal on earth they have a liberty to appeal to Heaven whenever they judge the cause of sufficient moment. And therefore, though the people cannot be judge, so as to have, by the constitution of that society, any superior power to determine and give effective sentence in the case, yet they have reserved that ultimate determination to themselves which belongs to all mankind, where there lies no appeal on earth, by a law antecedent and paramount to all positive laws of men, whether they have just cause to make their appeal to Heaven." (Two Treatises on Government (1689) Book 2, Chap. 8-14)

Clearly, Locke's opinions were not favorable to the establishment of government by judiciary; and we shall see further on that the most influential of the Framers of the United States Constitution thought exactly as did Locke, both in the matter of the submission of the minority to the majority, as well as in the matter of there being "no judge on earth" between the people and the Legislature, and the "appeal to Heaven." And, what is more to the point, they thought that they had actually put Locke's doctrine into the Constitution.

CHAPTER VI

THE FRAMING OF THE UNITED STATES CONSTITUTION

UCH were the historical experiences which preceded, and the intellectual influences and psychological reactions which acpanied, the American Revolution. That these intellectual influences were apparent in the institutions molded by the American patriots after the Declaration of Independence is apparent in all the State constitutions framed during that period. This is particularly true of the doctrine of the separation of powers of government. The Massachusetts constitution is the most notable example, but it does not differ in substance from the other State constitutions, even though its phraseology may be more striking in its accentuation of that doctrine. It is true that neither the constitution of Massachusetts, nor any of the other State constitutions framed during this period contain the specific provision against the interference of the judiciary with laws regularly passed by the legislature which was embodied in the French Constitution of 1791. But, on the other hand, it is hardly conceivable that the doctrine of the separation of powers should have meant one thing to Montesquieu and his French disciples and exactly the reverse to their American followers.

What, then, was the United States Constitution likely to be under these circumstances? It is to this argument from the probabilities of the case that the learned committee of the New York Bar Association resorts, when, after stating its theory of the American Revolution, it puts the question:

"When the framers of the constitution freed themselves from parliamentary absolutism, did they intend to substitute a consolidated congressional absolutism in national matters plus the absolutism of forty-eight State legislatures in State matters, without providing any tribunal to uphold the privileges of freemen as defined by them in the constitutional bill of rights, also to determine the inevitable conflicts between the Federal and State jurisdictions?"

This passage will be considered more in detail, and replied to more at length, further on. For the present it is sufficient to answer this rhetorical question by saying that, whatever the Framers are likely to have done, the most *un*likely thing for them to have done was to put Coke into the Constitution.

We do not overlook the fact that the United States Constitution was not framed in the first flush of revolutionary ardor. Some eleven years had elapsed between the Declaration of Independence and the framing of the Constitution, and many things had happened during those years, particularly during the few years following the close of the War of the Revolution, which cooled that ardor considerably, at least among the "better elements." In fact, the framing of the Constitution was largely due to a reaction against those ideas and tendencies which were most conspicuous at the time of the penning and signing of the Declaration of Independence. But two things must be observed in this connection: In the first place, this reactionary tendency affected only certain elements, namely, the propertied classes of the East; and touched very little, if at all, the people as a whole. And in the second place, even among the so-called "better elements," this cooling of the revolutionary ardor could not possibly have changed their entire point of view on government. It might have unconsciously affected the judgment of individuals, and even of large groups, in certain matters of detail, but it could not have effected such a complete change of mind as to make them embody in the Constitution principles which were the very reverse of what the most important of the American Revolutionists had professed all along and declared with so much eloquence and fervor during so many years.

It seems to be the historical theory of the supporters of the Judicial Power, sometimes avowed and sometimes unavowed, that by the time the Framers met in Philadelphia, the reactionary movement against the principles of the American Revolution had assumed such proportions that the principal emotion of the Framers was fear of the people, and their principal concern the protection of the minority against the majority. To this theory is sometimes added the addendum or modification that a few intriguing schemers, bent on depriving the people of their rights, and on fastening upon them a government of the "money power," or of property generally, "put one over," first upon the minority of

the convention, and then upon the majority of the people. Alexander Hamilton and James Wilson are supposed to have been the chief villains of this nefarious plot. This explanation may be good enough for those who believe in what might be called the muckraker's theory of history. It is entirely inadequate for any serious historian. Great historical events do not happen that way, and important institutions are not imposed upon an unwilling people in this manner. So much can be said a priori, and an examination of the historical evidence proves the muckraker's assertions to be quite untrue.

But first a few words as to the personnel of the Federal Convention. The personnel of the Convention, like the Constitution, has suffered much from extreme statements: its members were either demi-gods or else scheming rogues. Such were the opposing judgments of contemporaries, and these extreme statements seem to have been reproduced uncritically in our discussion of the Constitution generally, and of the Judicial Power particularly. With this modification: Some of the supporters of the Judicial Power profess to believe that the Framers of the Constitution were demigods, while ascribing to them things which could have been done only by scheming rogues. For our part, we are inclined to accept Prof. Farrand's judgment on this subject. After stating the two extreme opinions expressed by contemporaries on this point, Prof. Farrand says:

"Doubtless the truth lies between the two opinions. Great men there were, it is true, but the convention as a whole was composed of men such as would be appointed to a similar gathering at the present time: professional men, business men, and gentlemen of leisure; patriotic statesmen, and clever, scheming politicians; some trained by experience and study for the task before them, and others utterly unfit. It was essentially a representative body, taking possibly a somewhat higher tone from the social conditions of the time, the seriousness of the crisis, and the character of the leaders." (Farrand, Framing of the Constitution, p. 40)

And as to the particular villains of the piece, Alexander Hamilton and James Wilson, the following may be observed here:

James Wilson, although a lawyer by training and undoubtedly conservative in temperament, was not at all the enemy of the people which some historians have made him out to be. He was undoubtedly a staunch protector of property, and may have been

responsible for the famous clause in the Constitution which prohibits the states from passing laws impairing the obligation of contracts, which seems to have been the particular act which brought down upon his head the anathema of certain historians. But, on the other hand, he seems to have trusted the people considerably more than the average member of the Convention, probably believing that the people as a whole, particularly as represented in the legislature of a strong national government, are not such great enemies of property after all. And, in addition, it seems rather hard on that astute lawyer to make him responsible for the uses to which Marshall subsequently put the particular provision in the Constitution just referred to, in inserting which he was probably voicing the sentiments of a majority of the members of the Convention, without, however, any of them foreseeing the uses to which it might be put in the future. For it must be remembered, in this connection, that in order that this provision should be the instrument which Marshall made of it, it required additional legal doctrines which Wilson may not have shared or even guessed.

As to Alexander Hamilton, the proof of his general reactionary tendencies seems to be stronger than that against Wilson. But we need not enter here into the moot question, whether or not Hamilton was justly accused of being a monarchist at heart, desiring to institute a monarchy in this country. Prof. Farrand is of the opinion that this accusation was unjust. It seems to have been based principally on a passage from a speech made by Hamilton in the Constitutional Convention, in which he said that in his opinion "the British government was the best in the world"; and Prof. Farrand thinks that the context did not justify the conclusion that he wanted to imitate the British example by instituting a monarchy in this country. But even if we should assume that Hamilton's admiration for the British government went to the extent of a desire to imitate it in this country, it does not follow that he abhorred the rule of the people to the extent of desiring to put "Coke" into the Constitution. For it must be remembered that the British government of which Hamilton spoke in admiration was the British government of his day, that is to say, the constitutional government established after the Revolution of 1688, and not the British government of the Stuarts, which is the only British system of government in which the "Coke doctrine" may be said to have played any rôle whatever.

But even more important than this is the fact, which seems to have been overlooked by all those who discussed the subject, that Hamilton had precious little to do with the framing of the United States Constitution, whatever his influence may have been in its subsequent adoption. Even responsible historians have referred to Hamilton in a way to lead one to believe that Hamilton's opinions were decisive, or at least of the greatest weight, in the framing of the Constitution. What he thought on the subject is therefore paraded as conclusive evidence of what the Framers intended to put into the Constitution. As a matter of fact, however, the Constitution was actually modeled on what was known as the Virginia Plan, with the preparation of which Hamilton had absolutely nothing to do; and he actually played no rôle whatever in the Convention during the deliberating period. Not that he was not highly regarded by the members of the Convention. On the contrary, his importance was fully recognized even at that timewhich makes the insignificant rôle which he played in the Convention the more remarkable. The explanation lies in the fact that, notwithstanding his subsequent warm advocacy of the Constitution, he was entirely out of sympathy with the work of the Constitutional Convention while it was framing the Constitution. This led to his practically abstaining from participation in its work until very near the close. The speech already referred to was practically his only speech in the Convention. And the only work which he did there, besides delivering this speech—which was in the nature of a farewell address to the Convention, giving his reasons why he could not participate in its work—was his serving on the "Committee on Style," which gave the Constitution its final revision but made no changes of any importance. And it is even doubtful whether he participated to any extent in the work of this committee.

Nevertheless, it is Hamilton who is usually appealed to whenever proof is wanted of the fact that the Framers believed in the Judicial Power and meant to put it into the Constitution. This is undoubtedly due to the fact that his is the only statement of any importance made by any Framer contemporaneously with the adoption of the Constitution, which seems to support the American Doctrine.

We shall later discuss Hamilton's position further in connection with the adoption of the Constitution. For the present we

shall keep to its framing. And the most striking thing about the framing of the Constitution, in our connection, is the fact that this question was practically not discussed in the Constitutional Convention. The subject of the Judiciary as a whole was discussed very little in that Convention. And whenever it was discussed, the discussion related to entirely different matters—the structure of the Judiciary, the question of inferior federal courts, the tenure of office of federal judges, and similar matters. Although the American Revolution is supposed to have been made in order to perpetuate the doctrines of Lord Coke in the New World, and despite the claim that this was actually effected through the United States Constitution, the Framers of that instrument seem to have been singularly uninterested in the subject as far as can be gathered from their deliberations—a circumstance of considerable worriment and no little perplexity to those historians who accept uncritically the current theory of the Judicial Power. In discussing the work of the Federal Convention, Prof. Farrand says in his well-known work on the Framing of the Constitution:

"To one who is especially interested in the judiciary, there is surprisingly little on the subject to be found in the records of the convention. We have already seen that the first question in this connection that aroused any particular discussion had to do with the establishment of inferior courts. The objection to these courts came from the feeling that cases ought to be tried in the state courts first and come to the federal courts only on appeal. When that difficulty was disposed of, by permitting but not requiring the establishment of inferior courts, a question came up over the method of appointment of the judges. . . .

"Not a word in all this of that great power exercised by the federal courts to declare laws null and void if they are in contravention to the constitution. This power has been the subject of much dispute, and many have looked in vain in the proceedings of the convention for the authority to exercise any such power."

Prof. Farrand comes out of his perplexity by making the flat, but, as we shall see later, utterly unwarranted declaration that:

"The difficulty is easily solved. The question did not come up in connection with the discussion of the jurisdiction of the federal courts. At different times in the sessions of the convention, however, it was proposed to associate the federal judges with the executive in a council of revision or in the exercise of the veto power. At those times it was asserted over and over again, and by such

men as Wilson, Madison, Gouverneur Morris, King, Gerry, Mason, and Luther Martin, that the federal judiciary would declare null and void laws that were inconsistent with the constitution. In other words, it was generally assumed by the leading men in the convention that this power existed. Perhaps Madison expressed this in the best form. He has already been quoted as saying that he 'considered the difference between a system founded on the Legislatures only, and one founded on the people, to be the true difference between a league or treaty, and a Constitution.' He then went on to say: 'A law violating a treaty ratified by a pre-existing law, might be respected by the Judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves, would be considered by the Judges as null and void." (Farrand, op. cit. pp. 154-157)

What warrant there is for Prof. Farrand's assertion as to Madison's views on this subject will be discussed at length further below. Here we are interested in the general situation, which, according to Prof. Farrand, seems to be this: That notwithstanding the tremendous importance of the subject, it was, nevertheless, never discussed in the Convention, except as incidental to some other topic, because of an alleged general assumption by the leading men in the Convention that the power existed, which led these leading men to assure the Convention, "over and over again," that this power would be exercised by the federal judiciary. But upon close examination it will be found that "over and over again" is, to put it mildly, somewhat of an exaggeration. In fact, it borders dangerously on the "numerous precedents" which are so often and so glibly referred to as proof of the existence of the Judicial Power prior to the adoption of the United States Constitution.

Assuming, however, for the moment, that it had actually been "asserted over and over again" in the Convention that the judiciary had such a power even without special provision in the Constitution, is it conceivable that, if the Framers actually wanted the Judiciary to have that power, they would have let it rest on so precarious a foundation? By this time we already know that there were no real precedents for that power. One cannot help wondering, therefore, on what the men named by Prof. Farrand could have based their assurance in this respect; nor why the Convention should have taken such assurance. Surely, there was nothing in the past history of either England or this country which would warrant it. Is it possible that Prof. Farrand is in error both as to

the reason for the absence of any discussion in the Constitutional Convention of this most important subject as well as about the so-called assurances? Let us see:

Prof. Farrand says that Madison expressed "this" (i.e., the opinion of the convention on the Judicial Power) "in the best form."

On the other hand, Prof. Beard, in his book The Supreme Court and the Constitution, which appeared about the same time as Prof. Farrand's work, thinks that Madison's ideas on the subject were rather confused. Prof. Beard, who is of course as anxious as Prof. Farrand to have the great authority of Madison in support of the Judicial Power, feels constrained to say: "That Madison believed in judicial control over legislation is unquestionable, but as to the exact nature and extent of that control he was in no little confusion." And when we look at the "best form" which Madison is supposed to have given the ideas of the convention on our subject, as quoted by Prof. Farrand himself in the passage reproduced by us above, we cannot help but agree with Prof. Beard as to Madison's confusion on the subject—assuming, of course, that we accept Prof. Beard's assurance "that Madison believed in judicial control over legislation is unquestionable." For the passage quoted by Farrand is anything but a clear statement of the doctrine in question. And if this was the "best form" into which the ideas of the convention and its leaders could be put, their ideas on the subject must certainly have been in a deplorable state of confusion. But whatever may have been the state of confusion of either Madison or the other leaders of the convention on the subject of Judicial Power itself, one thing seems to be certain at least as to Madison, and that is this: That Madison had no doubt that the Framers did not intend to put the Judicial Power into the Constitution. For in 1788, that is to say, shortly after the framing of the Constitution, and before its final adoption, we find Madison making the following truly remarkable statement—remarkable, that is, in view of the assertions made by Professors Farrand and Beard:

"In the state constitutions and indeed in the federal one also, no provision is made for the case of a disagreement in expounding them (the laws), and as the courts are generally the last making the decision, it results to them, by refusing or not refusing to execute a law, to stamp it with its final character. This makes the

Judiciary Department paramount in fact to the Legislature, which was never intended and can never be proper."

This throws considerable doubt, to say the least, on the assurance of the learned Professors that Madison believed in the judicial power, and that the Federal Convention put it into the United States Constitution. It certainly does look extremely confusing to be assured that Madison unquestionably believed in Judicial control of legislation, when Madison himself says that the paramountcy of the Judiciary Department over the Legislature can never be proper. We shall therefore have to revert to the subject again in an effort to clear up this confusion, or at least to discover wherein the confusion lies, and who is really confused. For the present we are interested in the intentions of the Framers; and as to that, there seems to be no room for doubt, nor any possibility of "confusion," at least as to what Madison thought on the subject. His language is both clear and explicit. He says that the paramountcy of the Judiciary Department over the Legislature was never intended, and he says this of both the state constitutions and the Federal Constitution. And as to the latter at least Madison's authority is unquestioned.

Madison has been called the Father of the Constitution, and properly so; for there was no other man either in or out of the Convention, who had more to do either with the framing of that celebrated document, or with its adoption, than Madison. In this connection it is well to remember that Virginia was the moving spirit in the calling of the Federal Convention; that its delegation was the most conspicuous delegation in that Convention; and that James Madison was not the least important member of that delegation. In fact, notwithstanding the circumstance that the delegation included George Washington himself, it was James Madison who did the work of that delegation, and most probably furnished most of its ideas. This is particularly true of those ideas which had to do with the abstract theory of government and the frame of government as such, as distinguished from special provisions on particular subjects. For Madison was the scholar not only of the Virginia delegation but of the entire Convention. He was also its theoretician par excellence. His knowledge of history and of the theory of government was so vast that he had no peer in this respect in the Constitutional Convention. And there were only

two men in the entire United States who could at all compare with him in this regard. Those were Thomas Jefferson and John Adams, neither of whom was a member of the Constitutional Convention. He is said also to have had "the most correct knowledge of the affairs of the United States of any man in the United States." (Wm. Pierce, quoted by Farrand; op. cit. p. 17)

But Madison was more than the leading scholar of the Constitutional Convention: He was the leader of the Convention. The Constitution is based on the so-called Virginia Plan, a document submitted to the Convention at its very opening by the Virginia delegation, and it is generally assumed that James Madison was its author; and from the character of the man and of the document that assumption seems to be well founded. And from the opening of the Convention to its close Madison took a leading and conspicuous part in its deliberations. There was not a debate of importance in which he did not participate, usually making the most important speech on whatever was the object of discussion.

Furthermore, not only was Madison's own rôle in the Convention of such outstanding nature that he completely overshadowed every other member, but he took particular note of what the other members said and did, so that his notes on the Convention are our most reliable source of information, if not the only one, as to its deliberations and the opinions expressed by its members. Surely, if anybody knew what the Framers intended it was Madison. And Madison says that they never intended.

Nor has anyone as yet been able to produce a shred of evidence to the contrary.

This does not mean, of course, that there may not have been some men in the Constitutional Convention who believed in the Judicial Power, and who would have liked to see it made part of the Constitution. On that subject there is no evidence one way or another. For it must be remembered that there is quite a difference between a general belief in the goodness of a certain institution, and a concrete desire to introduce that institution into a particular country at a particular time under a particular set of historical conditions. As we have seen, Prof. Farrand admits that Hamilton was a great admirer of the British form of government, King and all. Yet Prof. Farrand assures us that Hamilton did not want to introduce monarchy into the United States. We also know that other members of the Federal Convention fre-

quently put their own opinions aside and voted for provisions which they did not like, because of the exigencies of the situation. That is true not only of the few well-known so-called Great Compromises, but also of other matters in which there were no formal compromises. Generally speaking, the Framers were practical men. They therefore did not attempt to introduce into the Constitution such of their ideas as they thought could not pass muster either in the Convention itself or before the ratifying bodies. The individual opinions of the members not expressed on the floor of the Convention itself, as reasons for their actions therein, are therefore practically valueless as a guide to the intentions of the Convention. This is well illustrated in the following notable instance:

Gouverneur Morris had more to do than any other man with the framing of the provision of the Constitution dealing with the admission of new states into the Union, and with the form which that provision finally took. When the Louisiana Purchase came up for discussion some sixteen years after the framing of the Constitution, he wrote a letter in which he said:

"Your inquiry . . . is substantially whether the Congress can admit, as a new State, territory, which did not belong to the United States when the Constitution was made. In my opinion they can not.

"I always thought that, when we should acquire Canada and Louisiana it would be proper to govern them as provinces, and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief, that, had it been more pointedly expressed, a strong opposition would have been made."

But history and people of the United States, including the United States Supreme Court, thought otherwise, and disregarded Mr. Morris' authority on the subject, although he claimed authorship of this particular provision of the Constitution. The opinions of the Framers expressed outside the Constitutional Convention, even if they were known to have been favorable to the Judicial Power, would therefore, not be decisive of our question.

As a matter of fact, however, the claim that a majority of the members of the Constitutional Convention, or the most important of them, were in favor of the Judicial Power is little less than an "extravagancy," to use the elegant expression of a noted Chief

Justice sometimes quoted in these discussions, and is certainly not borne out by "the record."

In this connection we must warn our readers against the habit of some historians of placing among the supporters of the Judicial Power every one who may be shown to have favored some kind of judicial power. Judicial Power may mean many things—and it is the kind that matters. We shall therefore proceed to investigate this subject in so far as it affects the Framers of the United States Constitution. Before proceeding, however, to this investigation, we must refer to two outstanding personages who did not sit in the Constitutional Convention, but whose influence on their fellow-citizens was paramount—Thomas Jefferson and John Adams.

Thomas Jefferson has been accused by historians who are supporters of the Judicial Power, of inconsistency and vacillation. On the one hand there is his long fight against the Judicial Power after Marshall's decision in Marbury v. Madison. But, on the other hand, so it is claimed, he favored "some kind" of judicial control at the time of the adoption of the Constitution. Ergo, he must have been inconsistent, vacillating, etc. We hope that an investigation of and proper discrimination between the kinds of Judicial Power which have been envisaged at different times of our history will honorably acquit Jefferson of the charges rashly made against him. We believe that most of the historians writing in support of the Judicial Power are themselves somewhat confused on the subject, failing to differentiate between the different kinds of Judicial Power there might be, and which actually were advocated by various people at this time as well as at other times; and that the confusion which they find in Madison, and the inconsistency which they see in Jefferson, are due entirely to this failure to understand the exact meaning of the terms they use, and to differentiate between the various forms of Judicial Power. We expect to prove, in fact, that Madison and Jefferson had a very clear understanding of the subject, and consistently held to a welldefined theory. It is true that in the course of their long public service and as the exigencies of our history required, they sometimes stressed one part of the theory and sometimes another. But the theory as a whole was consistent with itself, and was consistently adhered to throughout their entire public careers.

John Adams is very seldom referred to in these discussions. This is rather curious, if not actually anomalous. As we have al-

ready mentioned, Thomas Jefferson and John Adams were the only statesmen in the United States of that period whose vast learning and interest in the subject of governmental theory was at all comparable to that of James Madison. In fact, the trio towered above all of the rest of their associates, so that one is hard put to it to think of anyone else who could come anywhere near their stature. Not even Alexander Hamilton was in a class with them, -his great reputation resting on services and capacities of an entirely different kind. Of the three, John Adams is the only one who wrote systematic treatises on the subject. In fact, he was engaged on one of them at the very time that the Federal Convention was framing the Constitution at Philadelphia. It is therefore rather startling to find no reports of his opinions on this allimportant subject. Had he any? Did he know of the great and novel theory that was being introduced into the United States Constitution, which was to be our distinctive contribution to the theory of government?

This is particularly surprising as we are indebted to him for the report of James Otis' great speech which is so often quoted among the "precedents." Also, John Adams was a noted lawyer of his time and Chief Justice of his state; and had he so wished he could have been Chief Justice of the United States. He was of the Otis tradition, and subsequently head and front of the Federalist Party, the party which sponsored the Judicial Power when it did make its appearance in the political arena. Surely, he of all men must have been a pillar of support to the Judicial Power in these days; and if he was, he must have stated his views where people could hear or read them, for he was both a great speaker and a prolific writer. In fact, he wrote four volumes on the subject of government just about this time. Three of these volumes, comprising the extensive work entitled Defense of American Constitutions, was written, as its title indicates, to expound and defend the doctrines of American constitutionalism. The last of these was written while the Federal Convention was in session, and was published shortly after the Convention adjourned, and actually contains the United States Constitution as an appendix. The fourth volume, published under the title of Discourses of Davilla was published shortly after the framing of the United States Constitution, and while it was before the people for adoption. In these four volumes Adams roamed over the entire field of human

history—from ancient, through medieval, to modern times—in search of various forms of government, and analysis of them, in order to draw conclusions and lessons for the instruction of mankind at large and his American contemporaries in particular. Nothing escaped his enormous powers of research, and every known government, ancient, medieval, and modern, passed under review—from the government of great states like England and France, to such minute countries as occupy but a few square miles apiece. Here, then, was a man of vast erudition, solid position, and conservative opinion. Nay, here was the man who was to put John Marshall where he could decide Marbury v. Madison. What did he have to say on the subject?

Nothing. Literally and emphatically: Nothing.

In the course of his four volumes, Adams not only tells us what he has found in his vast researches, but also makes comparisons, appraising each government he reports on, comparing it with others; and he also states what he considers to be a model of government. His model, incidentally, is England. And his defense of American constitutions is based largely on the assumption that they are a reproduction in this country of the English form of government adapted to American conditions. He also discusses repeatedly the doctrine of separation of powers, which he considers the most fundamental requirement of a good constitution. And yet:

"Not a word in all this of that great power exercised by the federal courts to declare laws null and void if they are in contravention to the constitution."

These ominous words of Prof. Farrand with reference to the debates of the Constitutional Convention are literally true of John Adams' discussions of the theory and forms of government throughout four volumes. Nor is there the shadow of an excuse therefor. We are not dealing here with a convention purposing to do a certain work—frame a constitution—of whose members it may be said that they cared only for the result to be accomplished, and who may have hidden their true motives and opinions the better to accomplish it. No; we are dealing with a learned scholar writing an extensive work on the theory and practice of government, going into many and even curious researches in order to show what forms of government are good and what are unsatis-

factory. And in all of these four volumes he fails to mention the one great theory to introduce which into the modern world the American Revolution, (of which he was one of the great leaders), was designed, the theory that was to be the great contribution of the new world to the theory of government.

Verily, our Revolutionary Fathers must have been curious beings if their modern admirers and supposed followers are to be

believed.

Another point to be noted here is the paucity of the discussion of our subject in the fight for the adoption of the Constitution. It is true that whatever discussion of the subject there was at all occurred during this stage of the proceedings. But bearing in mind that there were thirteen ratifying conventions and a considerable pamphlet literature, the amount of time and space allotted to the discussion of this all-important subject seems to be ridiculously small. So much so, that one cannot possibly believe that the ratifiers of the Constitution could have possibly known that this great power was contained in the Constitution. And there was not here even the pitiful excuse which was brought forward by Prof. Farrand for the failure of the Constitutional Convention itself to discuss the subject. By some wild stretch of the imagination we may perhaps assume that the Convention was unanimously in favor of this power, and unanimous also in the opinion that the power was going into the Constitution although not expressed, and that there was therefore nothing to discuss. But, surely, that could not apply to the ratifiers. Here, at least, the Judicial Power could not possibly have been accepted unanimously without debate. All of the "precedents" speak against that. We have seen what happened in New York when it was merely surmised (erroneously, as it appears,) that a court had disregarded a statute enacted by the legislature. We have also seen the excitement caused by the decision in the neighboring State of Rhode Island, in the case of Trevett v. Weeden, the year before the meeting of the Federal Convention. And we also know the intense excitement aroused by the case of Bayard v. Singleton, decided in North Carolina while the Constitutional Convention was in session. The last case is particularly important in this connection as the public controversy which it brought forth took place while the Constitution was up for ratification. And yet, singularly enough, neither Iredell's letter in support of the decision, nor Spaight's letter attacking it, contains any reference to the Federal Constitution, the ratification of which was then under consideration.

In any discussion of the Judicial Power, various distinctions must be borne in mind, and the subject be considered from various angles, if we are not to become hopelessly confused. In the first place, there is, of course, the great distinction between the power of the courts to declare void acts of the legislative department of their own government, and their right to declare void acts of the legislative department of a government subordinate or inferior to their own government. In our own case, there is therefore a fundamental distinction between the right of the federal judiciary to declare invalid state laws determined to be in contravention of the Federal Constitution, and the right in the same courts to declare an act of Congress invalid for the same reason. A different problem is encountered in the state courts, and a further distinction should be borne in mind-namely, between the power to declare an act of its own legislative department invalid because of infringement against their own constitution, and the right to declare such an act invalid for infringement of a constitution not of its own government but of a superior or paramount government. In a certain sense the right of a state court to declare an act of its own legislature invalid is similar to the right of the federal courts to declare an act of Congress invalid. But the similarity is not complete. For we are dealing here with a government which is not entirely sovereign in its own field, but subordinate to a superior or paramount government; the problem is therefore complicated by the question of the relation of the courts of the subordinate power to the superior government.

There is, also, the distinction between the right of refusal to enforce an act of the Legislature violating an express provision of the Constitution, which would in itself be in the nature of a revolutionary act, being a flagrant breach of the Constitution; and the right to declare an act of the Legislature unconstitutional in a case where the question depends on implications, as this would involve not a flagrant breach of the Constitution by the Legislature but a difference of opinion between the Legislature and the Judiciary as to the interpretation of the Constitution. Clearly, the two cases are neither in principle nor in practice on the same footing. This distinction has already been referred to in an earlier part of this work, but it must be insisted upon here, because it goes to the very

essence of the subject as viewed at the time of the framing and the adoption of the United States Constitution.

An even more important question in this connection is concerned with the use of the word "unconstitutional." What do we mean when we say that a law is unconstitutional? We are so used to this term that we assume that it has a certain definite and concrete meaning for all people and at all times. As a matter of fact, however, there are at least two fundamentally different ways in which the phrase "unconstitutional and therefore void" may be, and has been, used in the history of the Judicial Power in this country. The phrase may mean merely that in deciding a certain case between two individuals the judges refuse to apply or give effect to a certain enactment of the Legislature, which, in their opinion, the Legislature had no right to enact under the provisions of the Constitution from which it derives its existence. But, it may mean much more. When the United States Supreme Court declared unconstitutional the first Income Tax Law in Pollock v. Farmers Loan and Trust Co., it did not mean merely that the court refused to enforce or apply the provision of that Act in the litigation between Mr. Pollock and the Farmers Loan and Trust Company. What it really meant was, that the United States Supreme Court interpreted the Constitution in a certain manner, namely, as not permitting the enactment of income tax laws, and that that interpretation of the Constitution became binding upon everyone in the United States, including the President and Congress. And it would have been considered revolutionary for either of these theoretically co-equal departments of our government to have disregarded the opinion of the Supreme Court.

Manifestly, this is quite a different power from the one first referred to. In the first case, the Judiciary has the power to decide for itself, for its own guidance, the meaning of the Constitution, and to itself act upon such interpretation without, however, being able to force its interpretation upon the other and co-equal departments of the government. Such was the original meaning of the term. But when the United States Supreme Court now says "unconstitutional," it means something entirely different. It means that it has laid down an absolute rule of conduct for the entire government of the United States. We are dealing no longer with a decision between private parties, but with a rule of government.

When we say that the Judiciary has the right to declare legislation unconstitutional, we mean that the Judiciary has the sole and exclusive power of finally and irrevocably interpreting the Constitution, and that its interpretation is binding on all and sundry, which is the same as saying that it is the ultimate government.

But this was clearly not what James Wilson meant when he said that the Judiciary has a right to declare laws void when unconstitutional. Our readers will recall Wilson's opinion in this connection quoted in an earlier portion of this work. Clearly, what Wilson was talking about was not something in the nature of the first alternative suggested above,—namely, the right of the Judiciary to decide for itself, while adjudicating private rights as to the true meaning of the Constitution so as to be able to adjudicate upon those rights,—without, however, its interpretation being binding upon any other governmental department. Wilson makes this as clear as it could possibly be made:

"Whoever—says Wilson—would be obliged to obey a constitutional law, is justified in refusing to obey an unconstitutional act of the legislature—and that, when a question, even of this delicate nature, occurs, every one who is called to act, has a right to judge."

Under the Wilsonian theory of the Judicial Power, therefore, the President of the United States, in whose opinion the income tax law declared unconstitutional in Pollock v. Farmers Loan & Trust Co. was a valid and constitutional exercise of the taxing power, had the right, nay the duty, to enforce that law even after it had been pronounced unconstitutional by the United States Supreme Court. To us the idea of the President of the United States enforcing a law declared unconstitutional by the Supreme Court is simply unthinkable. "Who has ever heard of the sheriff?" But that is due entirely to the fact that we are trained to regard our government as a government of courts, which is itself due to the existence of the modern Judicial Power. It would not seem so in other countries, where taxes are usually not collected through courts, but by means of tax-gatherers who, under the Wilsonian theory, would have as much a right to decide for themselves, as part of the executive department, as to what the Constitution meant, and therefore whether or not the income tax was unconstitutional, as had the judges who pronounced the judgment in Pollock v. Farmers Loan and Trust Co. And, what is more important, it is this Wilsonian theory, and not the modern Judicial Power, that people had in mind at the time of the framing and adoption of the U. S. Constitution whenever they did discuss the right of the Judiciary to refuse to enforce unconstitutional legislation.

Wilson was not a political philosopher. He was a lawyer and a Scotchman. He therefore gave his theory a legalistic and individualistic form. To him it was primarily a question of law, to be argued out from abstract legal principles by the abstract legal logic of the Law of Agency, and a question of conscience up to the individual who was called upon to act in one way or another with regard thereto.

To Madison and Jefferson, who were statesmen and political philosophers, it was a question of political society and of the principles of political science. It was a question primarily of the distribution of the powers of government. There were the political philosophers, with Montesquieu at their head, who said that the preservation of liberty requires that free government should consist of three *independent* departments—legislative, executive, and judicial—and that the avoidance of encroachments by one upon the other was of primary importance.

An independent Judicial Department ought to have the right to decide for itself the meaning of the constitution from which it derives and under which it functions. Otherwise it would not be independent. Of course, a similar right must reside in the other two departments.

As to the Legislature, the question really was not whether it ought also to have that power, but whether it should be the sole department having that power as was the case of the British Parliament, which did not seem to offend Montesquieu's notion of the distribution of powers. The real question, therefore, was whether there should be a Legislature with supreme authority over both the executive and judicial departments, or a really independent Executive and a really independent Judiciary, co-equal with the Legislature itself. Of course, this gave rise to various problems in the working out of a system of government—problems which evidently bothered Madison and Jefferson, the statesmen and political philosophers, much more than they bothered James Wilson, the lawyer. It is quite evident that the

way the problem was to be solved was the way all political problems are solved by political statesmen—namely, by some compromise or other. In the working out of the details of government, Madison and Jefferson probably did not quite agree on the exact place of the Judiciary and its exact powers. But theoretically they agreed; and their theory, although differently founded, was the same as that of James Wilson. And upon further inquiry we shall discover that every other supporter of the Judicial Power of that age and generation conceived the Judicial Power in the Wilsonian manner. Even Alexander Hamilton—the great stand-by of all supporters of the Judicial Power from the time of the adoption of the Constitution until the present day.

But before paying our respects to Hamilton, we must remain yet awhile with Madison and his perplexities in those practical problems of statesmanship which seemed to Prof. Beard so confusing. In this connection we must call attention to the fact that, in the Constitutional Convention, James Madison repeatedly brought forward the idea of a Council of Revision, which was part of his original Virginia Plan. In that plan, the resolution covering this point read as follows:

¹ The present work is not concerned with the problem of federal relations. We, therefore, assume that the right of the Federal courts to declare unconstitutional state legislation contravening the Federal Constitution is perfectly proper and normal. This is not, however, necessarily so. And it is extremely interesting in connection with our problem that even in this sphere Madison seems to have favored legislative supervision rather than judicial, as is indicated by the Virginia draft. The Virginia Plan which, as explained in the text, although presented by Randolph was probably the work of Madison, and in any event represented his views, contained the following resolution: "Resolved . . . that the national legislature ought to be empowered . . . to negative all laws passed by the several states contravening, in the opinion of the national legislature, the Articles of Union, or any treaty subsisting under the authority of the Union." On the other hand, there is no provision in this draft for any supervision by the federal judiciary of state legislation, except insofar as the federal judiciary, or a portion thereof, might form a part of the Council of Revision provided for in this draft. The resolution for the Council of Revision included a provision that acts of the federal legislature negativing state legislation should be subject to the veto of the Council of Revision

As is well known, Madison's efforts to have such a council were unsuccessful. It was this unsuccessful attempt to establish a Council of Revision which Madison had in mind in the passage from which we quoted above from his letter of 1788.

It is clear from the wording of this resolution that Madison's practical sense dictated to him the compromise which would sacrifice the right of the judiciary to declare laws invalid, provided the judges would be given a share of the veto power in the Council of Revision—just as he was ready to sacrifice the right of the Executive to declare laws invalid if a veto be given him. And it is worthy of note that in both instances the veto was to be a qualified one, and could be overridden by the Legislature. In fact, according to the original Virginia Plan as seen in the above resolution, this veto could be overridden by a bare majority of the two houses. Madison's views of the subject clearly indicate that notwithstanding his desire for an independent executive and an independent judiciary, he did not consider it indispensable to the independence of these co-equal powers that they should have a right of independent interpretation of the Constitution, provided that they be given some share in the framing of the laws.

Madison's complaint already quoted above, which seemed so confusing to Prof. Beard, now becomes crystal clear. We can hear Mr. Madison saying to those who voted down the Council of Revision on the ground that the Judiciary ought not to participate in legislation:

"It is all very well for you gentlemen to say that the departments ought to be absolutely separate and distinct, and that the Judiciary ought not, therefore, to participate in legislation. That sounds very well in theory, but look at the practice. We have created an independent judiciary. Independent particularly of the people because of the mode of appointment and the tenure of office. An independent Judiciary ought to have the right to judge independently, which involves the right to determine for itself the meaning of the Constitution, in so far as its own department is concerned, that is to say, in litigated cases coming before it. Now, many, if not most, laws, become the subject of litigation. In such cases the Judiciary has the last word. Therefore, if the Judiciary has the power of independently interpreting the Constitution, and

same as any other legislative act—thus again proving that in the view of the sponsors of this draft, which meant the entire Virginia Delegation, the question of federal relations, including the power to veto state legislation contrary to the federal constitution, was considered a legislative and not a judicial matter.

to refuse to enforce laws regularly passed by the Legislature which do not fit in with its own interpretation of the Constitution, then you have practically made the Judiciary superior to, instead of coequal with, the legislature, which was never intended and can never be proper."

We now come to that pillar of strength among the supporters of Judicial Power, Alexander Hamilton, and to his great argument in Number 78 of The Federalist. No one has ever noted any "confusion" in Hamilton on the subject of the judiciary. But, we regret to say, only because most supporters of the Judicial Power do not look particularly carefully at such matters. As a matter of fact, a good look at Hamilton will find him almost as confused as Madison himself; which should rather have been expected, since Madison and Hamilton were closely associated in the fight for the Constitution.² But most of the supporters of the Judicial Power prefer to cover Madison with Hamilton's mantle, and assure us that since Hamilton was such a strong supporter of the Judicial Power and had so carefully reasoned it out in his famous argument in The Federalist, Madison, his associate on The Federalist must have held the same views.

The latter supposition is quite right. Madison and Hamilton may not have exactly seen eye to eye on this subject, but they were in general agreement on the fundamentals of this theory, whatever disagreements they may subsequently have had as to its application in practice. In his work already referred to, Prof. Beard has the following to say about Hamilton in his relation to our subject:

"In Number 78 of The Federalist, written in defence of the Constitution, and designed to make that instrument acceptable to the electorate, Hamilton gave a full exposition of his view of the new system. His statement of the principle of judicial control so thoroughly covers the ground that it deserves quotation at length:"

² See note 3, infra, p. 112.

We would like, however, to offer suggestion that No. 81 Federalist was written under the influence of Madison, who had probably been unaware of the contents of Federalist No. 78 until after its appearance, and then probably insisted on its disavowal. Hamilton thereupon tried to withdraw from the position taken by him in Federalist No. 78 as gracefully as he could, by pretending that he had really never intended to say anything new or startling, or that was not in consonance with good English constitutional practice. That he should have made but a poor job of it is, under the circumstances, but natural.

We agree with Prof. Beard's statement that Hamilton's exposition of his theory of judicial control deserves quotation at length. And not only for the reason mentioned by Prof. Beard, but also, and perhaps principally, because it is the most elaborate contemporary statement of the theory there is-giving us an insight into the situation as it then existed, and into the conception of this power as held by its most thorough and most noted supporter at the time of the adoption of the Constitution. But for the same reason we shall quote a little more than Prof. Beard has quoted in his work. For while in No. 78 of The Federalist, Hamilton discussed the subject at greater length than elsewhere, and while that number of The Federalist is the only one usually quoted in this connection, it is not the only issue of The Federalist wherein Hamilton discusses the subject. He discusses it also in No. 81; and in our opinion, the statement in No. 78 of The Federalist gives only half the case, and no complete understanding of the Hamiltonian theory of the Judicial Power can be had unless the two statements are read together. The statement quoted by Prof. Beard from No. 78 of The Federalist is as follows:

"The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

"Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests can not

be unacceptable.

"There is no position which depends on clearer principles than that every act of a delegated authority contrary to the tenor of the commission under which it is exercised is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal;

that the servant is above his master; that the representatives of the people are superior to the people themselves; that men, acting by virtue of powers, may do not only what their powers do not

authorize, but what they forbid.

"If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this can not be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be, regarded by the judges as a fundamental law. It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

"Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than

those which are not fundamental.

"This exercise of judicial discretion, in determining between two contradictory laws, is exemplified in a familiar instance. It not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case it is the province of the courts to liquidate and fix their meaning and operation: So far as they can by any fair construction be reconciled to each other, reason and law conspire to dictate that this should be done: Where this is impracticable it becomes a matter of necessity to give effect to one, in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first. But this is a mere rule of construction, not derived from any positive law, but from the nature and reason of the

thing. It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable that, between the interfering acts of an equal authority, that which was the last indication of its will

should have the preference.

"But in regard to the interfering acts of a superior and subordinate authority, of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that, accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

"It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise Will instead of Judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove anything, would prove that there ought to be no judges distinct from that body.

"If then the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essen-

tial to the faithful performance of so arduous a duty.

"This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constituion will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution, would, on that account, be justifiable

in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments can warrant their representatives in a departure from it, prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution where legislative invasions of it had been

instituted by the major voice of the community.

"But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments than but a few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more states than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.

"That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature, there would be danger of an im-

proper complaisance to the branch which possessed it: if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws."

This seems to be clear, definite and unequivocal, as a statement of position, whatever we may think of the arguments advanced in support of it. Now let us turn to No. 81 of *The Federalist*. There Hamilton amplifies his statement as follows:

"The arguments, or rather suggestions, upon which this charge is founded, are to this effect: 'The authority of the proposed Supreme Court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the SPIRIT of the Constitution, will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous. In Britain, the judicial power, in the last resort, resides in the House of Lords, which is a branch of the legislature; and this part of the British government has been imitated in the State constitutions in general. The Parliament of Great Britain, and the legislatures of the several States, can at any time rectify, by law, the exceptionable decisions of their respective courts. But the errors and usurpations of the Supreme Court of the United States will be uncontrollable and remediless.' This, upon examination, will be found to be made up altogether of false reasoning upon misconceived fact.

"In the first place, there is not a syllable in the plan under consideration which directly empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State. I admit, however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of the convention, but from the general theory of a limited Constitution; and as far as it is true, it is equally applicable to most, if not to all the State governments. There can be no objection, therefore, on this account, to the federal judicature which will not lie against the local judicatures in general, and which will not serve to condemn every constitution that attempts to set bounds to legislative discretion.

"But perhaps the force of the objection may be thought to consist in the particular organization of the Supreme Court; in

its being composed of a distinct body of magistrates, instead of being one of the branches of the legislature, as in the government of Great Britain and that of the State. To insist upon this point, the authors of the objection must renounce the meaning they have labored to annex to the celebrated maxim, requiring a separation of the departments of power. It shall, nevertheless, be conceded to them, agreeably to the interpretation given to that maxim in the course of these papers, that it is not violated by vesting the ultimate power of judging in a part of the legislative body. But though this be not an absolute violation of that excellent rule, yet it verges so nearly upon it, as on this account alone to be less eligible than the mode preferred by the convention. From a body which had even a partial agency in passing bad laws, we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them, would be too apt in interpreting them; still less could it be expected that men who had infringed the Constitution in the character of legislators, would be disposed to repair the breach in the character of judges. Nor is this all. Every reason which recommends the tenure of good behavior for judicial offices, militates against placing the judiciary power, in the last resort, in a body composed of men chosen for a limited period. There is an absurdity in referring the determination of causes, in the first instance, to judges of permanent standing; in the last, to those of a temporary and mutable constitution. And there is a still greater absurdity in subjecting the decisions of men, selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge. The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and as, on this account, there will be great reason to apprehend all the ill consequences of defective information, so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshalled on opposite sides will be too apt to stifle the voice both of law and equity.

"These considerations teach us to applaud the wisdom of those States who have committed the judicial power, in the last resort, not to a part of the legislature, but to distinct and independent bodies of men. Contrary to the supposition of those who have represented the plan of the convention, in this respect, as novel and unprecedented, it is but a copy of the constitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia; and the preference which has been given to those models is highly to be

commended.

"It is not true, in the second place, that the Parliament of Great Britain, or the legislatures of the particular States, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory, neither of the British, nor the State constitutions, authorizes the revisal of a judicial sentence by a legislative act. Nor is there anything in the proposed Constitution, more than in either of them, by which it is forbidden. In the former, as well as in the latter, the impropriety of the thing, on the general principles of law and reason, is the sole obstacle. A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases. This is the principle, and it applies in all its consequences, exactly in the same manner and extent, to the State governments, as to the national government now under consideration. Not the least difference can be pointed out in any view of the

subject.

"It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty, from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords, at the same time, a cogent argument for constituting the Senate a court for the trial of impeachments."

This passage, while apparently an amplification of his original argument, is rather puzzling. What does Hamilton mean by referring to the British Parliament in this connection? As we understood it all along, the American Doctrine of the Judicial Power is exactly the reverse of the British doctrine of the Sovereignty of

Parliament; and we were assured by a very learned committee of the New York State Bar Association that the whole purpose of the American Revolution was to establish the Coke doctrine of the Judicial Power which had been overthrown by the English Revolution of 1688, when the Sovereignty of Parliament was established. Now comes Alexander Hamilton, the great sponsor of the Judicial Power in the United States, and practically wipes out the difference between the American and the British Constitutions in this respect,—assuring us that there is no substantial difference between the powers of the Legislature under the United States Constitution and the British Parliament. What exactly does Hamilton mean when he says: "It is not true that the Parliament of Great Britain, or the legislatures of the particular States, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States"?

Note, first of all, the assumption that the State Constitutions and the British Constitution are alike in this respect; and the attempt to prove that the Federal Constitution isn't really different. We all know that the British Parliament is not bound by any interpretation which a British court may place upon the British Constitution. If a British court were to decide that Magna Charta prohibits the issuance of general Writs of Assistance, the British Parliament may nevertheless proceed to pass a law providing for the issuance of such Writs. For the interpretation of Magna Charta by the courts is not binding upon the British Parliament. Did Hamilton perhaps mean to assert that the relation of the legislature to the courts was the same under the State Constitutions as then understood? And did he mean to suggest that in his opinion it would be no different under the United States Constitution? Did he mean that, for instance, after the decision of the United States Supreme Court in Pollock v. Farmers Loan and Trust Co., the Congress of the United States could proceed to enact and enforce another income tax law, although it could not reverse the judgment in the particular case of Pollock v. Farmers Loan & Trust Co.? 3

³ Prof. John Dickinson, who has read this portion of the text in manuscript, thinks that our efforts at reconciling Hamilton's statements in the two issues of The Federalist have not been particularly successful. He is of the opinion that "Hamilton's language rather indicates a lack of clarity in his own mind on the central issue." To which we may observe that on the "central issue"—that is, as to

It may sound startling to those who get their notions on the subject from our regular historians, but that is exactly what Hamilton seems to have meant.

That was, in fact, the theory of Judicial Power as understood at that time by all those who favored that power. Under that theory, and it was that theory that Hamilton was expounding in No. 81 of The Federalist, the Congress is no more bound by the interpretation placed upon the Constitution by the federal judiciary than is the British Parliament by the interpretation placed upon Magna Charta by an English court. The Judicial Power, as understood and expounded by Hamilton and his associates, merely meant that the American courts, unlike the British courts, were not bound by the interpretation placed on the Constitution by the Legislature, and could, therefore, refuse to enforce a law in conflict with the Constitution. But neither was the Congress bound by the judicial interpretation. Under that theory, the Congress had the right to proceed to re-enact the Income Tax Law, notwithstanding the decision of the Supreme Court in Pollock v. Farmers Loan & Trust Co. In fact, it could instruct the President to, or the President of the United States could of his own accord, proceed to collect the taxes provided for in that law, notwithstanding the decision in Pollock v. Farmers Loan & Trust Co., in so far as it could be done without resort to the courts. And the President could proceed to do so of his own accord, if he agreed with the Congress instead of the Supreme Court.

Hamilton's confusion on the "central issue"—we are quite in agreement with Prof. Dickinson. The important point which we desired to convey in the text was, not so much that Hamilton had clearly-defined views on the subject, but, rather, that this supposed great pillar of strength of the Judicial Power among the Framers was but a broken reed. Elsewhere we have put the matter thus:

"Clearly, the man who did that could not have thought either long or profoundly on the subject. . . . Hamilton's essay in No. 78 of the Federalist has been highly praised for its clarity of statement. And, read by itself, his statements in that essay have a superficial clarity. But behind this clarity of statement, there is woeful confusion of thought—as can be easily discovered by contrasting Federalist No. 78 with Federalist No. 81. The two are entirely contradictory. . . . Clearly, one who was so confused as to just what it was that he was proposing, could not be expected to throw much light on the underlying philosophic and political principles of the constitutional arrangement he was advocating." (Boudin, The Anarchic Element in the Notion of a Higher Law, VIII N. Y. U. Law Quarterly Review, 1.)

Prof. Edward S. Corwin thinks that Hamilton had originally not been a supporter of the right of judicial review, but had been converted to that view between the writing of No. 33 and No. 78 of the Federalist. If that be so his conversion was not a wholehearted one. And, in any event, it did not contribute to clarify his ideas on the subject. See, also, Appendix D, infra, at end of this volume.

This is borne out by the entire tenor of the discussion of the subject in the Constitutional Convention and the ratifying conventions, as well as in the pamphlet literature. For, while the power of the Judiciary to declare laws unconstitutional was never discussed in the Constitutional Convention and very little during the process of ratification, the general subject of the Judiciary is referred to again and again, and the Judiciary that is referred to is obviously of a different kind from the one with which we are familiar. No August Tribunal then. No, not then. The most striking thing about all of the references to the Judiciary is the assurance that it was only a weak power in need of defensive weapons to protect itself against encroachment by the other departments, particularly the Legislature. And the right to declare legislative enactments invalid when they contravene the Constitution, is itself conceived by many of its advocates, including Hamilton, as a defensive weapon against the encroachments of the Legislature upon the Judiciary.

Clearly, the Framers and Ratifiers could not have had in mind the Judicial Power as we know it, and as expounded by Judge Baldwin and its other modern supporters—the Supreme Political Power in the State.

This question of a "defensive weapon" is important in another connection, and deserves further attention.

In order that we may better understand this matter of "defensive weapons," which occurs again and again in The Federalist and other contemporaneous discussions of the Constitution—and not only with respect to the judiciary, but also with respect to the executive—it must be borne in mind that when the Framers and Ratifiers of the Constitution were speaking of "unconstitutional" legislation, they had in mind something entirely different from what we generally think of when using this expression. To us, the primary, if not the only question, is that of encroachment by the legislature upon the domain of individual rights. In other words, we mean the protection of the minority against the so-called "tyranny of the majority." But this is not what "unconstitutional" meant in the discussions attending the framing and adoption of the United States Constitution; except, perhaps, in an incidental way. They were primarily interested in two things: First, the division of power between the Federal Government and the State governments; and sec-

ond, the division of power between the separate departments of government. Unconstitutional legislation—the concept, not the term; for the term was hardly known then—therefore meant either an encroachment by the Federal Government upon the State governments, or an encroachment by the Congress upon the proper sphere of either the Executive or the Judiciary. In other words, "unconstitutional" meant a violation of the distribution of the powers of government as made by the Constitution. Hence the argument, so puzzling to us with our present day notions, repeatedly advanced in The Federalist, that we need not worry about the Federal Legislature enacting unconstitutional laws, because the States would resent it and prevent it. Hence, also, the arguments used, as already noted, in connection with both the Executive and the Judiciary, that certain powers were given to these departments in order to prevent unconstitutional encroachments upon them by other governmental departments.

This leads us to another interesting conclusion: Whatever the extent of the Judicial Power as conceived by its supporters at the time of the framing and adoption of the United States Constitution, it was not intended as a means for the protection of individual rights, that is to say, as a protection of the minority against the "tyranny of the majority" in the domain of general or social legislation.

We have referred already to the rhetorical question of the learned committee of the New York State Bar Association, implying that it is inconceivable that the Framers could have left the fate of individual rights to the tyranny and caprice of a majority as represented in Congress. Used as these gentlemen are to our governmental system under the modern Judicial Power, such a thing seems inconceivable to them. But that is exactly what the Framers of the United States Constitution did; and we have no less authority than Madison and Hamilton themselves, in no less an authoritative publication than The Federalist itself, for this proposition. But, before quoting Madison and Hamilton, there is something about the Constitution itself which completely disproves the notion that the Judicial Power was put into the Constitution in order to protect so-called "fundamental rights." And that is the conclusive circumstance that, as the Constitution came from the hands of the Framers, there were no fundamental rights in it and the Judicial Power would have been utterly useless for

that purpose. In order that the Judicial Power be of any use for such a purpose there must be, in the Constitution, something in the nature of a prohibition to which it might attach itself. Such are the prohibitions which are contained in the first ten amendments to the Constitution, commonly known as the Bill of Rights. But when the Constitution came from the hands of the Framers, it had no Bill of Rights.

This circumstance has been lost sight of by most of those who discuss the subject, but it is of controlling importance in this connection. With no Bill of Rights in the Constitution, there is naturally no Bill of Rights to enforce; and where there is no Bill of Rights to enforce, there is no way of protecting the "fundamental rights of the individual" against the vicious majority. It is true that the Constitution itself contains a number of prohibitions, but the important ones are prohibitions against the States and not against the national government. The only prohibitions against the national government are exactly three in number, and all three of them put together amount to so little that it would be absurd to invent a special form of government for their protection. And the fact that there was no Bill of Rights in the Constitution as it came from the hands of the Framers has yet another significance. It confirms the theory advanced by us, that the Framers deliberately and intentionally omitted the protection of fundamental or individual rights, or those of minorities, from the Constitution.

In view of the decisive language of the Constitution itself it would seem superfluous to cite other "authorities" for this proposition. Because, however, of the persistence of this confusion in the minds, not only of laymen but of historians and eminent lawyers, it will not be amiss to cite the great authority of the Father of the Constitution and of Alexander Hamilton. In No. 51 of The Federalist, they say:

"It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority—that is, of the society itself; the other, by compre-

hending in the society so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority. This, at best, is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government. This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government, since it shows that in exact proportion as the territory of the Union may be formed into more circumscribed Confederacies, or States, oppressive combinations of a majority will be facilitated; the best security, under the republican forms, for the rights of every class of citizens, will be diminished; and consequently the stability and independence of some member of the government, the only other security, must be proportionately increased. Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful. It can be little doubted that if the State of Rhode Island was separated from the Confederacy and left to itself, the insecurity of rights under the popular form of government within such narrow limits would be displayed by such reiterated oppressions of factious majorities that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had

proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; whilst there being thus less danger to a minor from the will of a major party, there must be less pretext, also, to provide for the security of the former, by introducing into the government a will not dependent on the latter, or, in other words, a will independent of the society itself."

We now have the answer to the great rhetorical question of the Special Committee of the New York State Bar Association, given by the Framers themselves. They say, in effect:

"Yes, gentlemen, we did; though not exactly as you put it. We did not establish any consolidated congressional absolutism, for the reason that we have established a pretty strong and independent executive, with powers at least as great as those of the King of England himself. And we also have established an independent judiciary, independent in the manner of its appointment as well as in its tenure of office. And they may have certain powers, which English judges have not, although they are without power to protect minorities or 'fundamental rights' as you call it, against the will of the people as expressed in the national legislature.

"Of course, you, as eminent lawyers, must know that we had nothing to do with the establishment of the state governments, and therefore could not establish any absolutism, either of thirteen or of forty-eight state legislatures, as those matters depend on state constitutions. Some of us were of the opinion that the national legislature ought to be able to supervise state legislation, but others thought otherwise; and, in any event, all of us thought that the people would not stand for that, so we left that out of the Constitution. In the absence of any power of revision in the national legislature, there was no way in which we could provide in the Constitution for any supervision of State legislation in purely State matters. As you gentlemen well know, the United States Supreme Court which we established, and which you so greatly admire, will have held in due course of time that even if we had, by our Constitution, given to the federal judges a general power to declare legislation unconstitutional, they would still be powerless to protect the people of the states against the absolutism of State legislatures, for what you call 'fundamental rights' are state matters and depend on the State constitutions, and not on our Constitution. The Federal Judiciary has no power, as you know by this time from the decision of the United States Supreme Court, to enforce the provisions of State constitutions, and protect

the people of the several states from violations by their State legislature of any Bill of Rights which the State constitutions might contain. And as to 'the privileges of freemen' as defined by us—why, gentlemen, we are rather surprised to hear you talk of that, since you ought to know that we have never done any such thing as to define the privileges of freemen. We have not included

any Bill of Rights in the Constitution we framed.

"Of course that does not mean that we were careless about these 'privileges of freemen' that you refer to. They certainly have given us great concern, and we spent on them considerable thought while we were framing the Constitution. But, you see, protecting 'the privileges of freemen' is a rather delicate matter, and not free from danger. The only way that it can be done is by inserting into the Constitution what is commonly called a Bill of Rights, and then providing an independent machinery whereby the Legislature would be prevented at all future times from passing laws which might in any way infringe on the provisions of this Bill of Rights. But such an independent machinery must be independent, first of all, of the people. For if the Guardians of the Constitution to whom this protection would be intrusted should be elected by the people themselves and be responsible to the people, they would be no better than the Legislature itself. But if they should be independent from the people they would themselves be a greater danger than the danger that we run by leaving the entire matter out of the Constitution. Such an independent agency would in course of time absorb all of those powers which we would so carefully take away from the Legislature, and, not being responsible to the people, would be much more dangerous to them than the Legislature could possibly be. When the Legislature passes an unjust law—'unjust,' that is, from the point of view of the minority—the minority may at least hope that the people may in course of time see the injustice of the law. Thereupon the minority would become the majority, and have the foolish or knavish legislators replaced by wise and upright ones. But if we had set up a separate Board of Guardians, these Guardians might in time usurp all power to themselves, and might in course of time become the absolute rulers of the people.

"Take, for instance, our own Judiciary, that we have provided for in our Constitution. We have made them thoroughly independent both of the people and of the appointing power. We believe that judges should be independent, so that they may be upright in giving their judgments as between men and men without fear or favor. But imagine what would have happened if we had made them the Guardians of the Constitution in your sense of the word. How long do you think our vaunted separation of powers, so highly thought of, as you know, by M. Montesquieu and the other good men whose ideas we esteem highly, would have

lasted? Why, in no time this 'weakest of the departments' would have become the supreme authority in the government of the country. Did you want us to frame a Constitution in which the supreme authority would lie in the hands of a power absolutely independent of the people?"

But what of the "fear of democracy" and "legislative absolutism" of which we hear so much in these discussions? As we have already stated, we do not believe that the Framers of the Constitution were demi-gods. Nor do we believe that all of them were exactly aflame with the ardor of democracy. But, on the other hand, we believe that the assertion that all the Framers of the Constitution were animated by hatred of democracy and fear of the people, is groundless. There were, no doubt, some men in the Convention who hated all democratic ideas, and who distrusted the people sufficiently to be anxious to put into the Constitution all manner of devices which would prevent the will of the people being heeded in the government of the United States. But these were few, and of comparatively little influence in the framing and adoption of the Constitution. The great majority of the Framers, and the vast majority of the people, believed in democracy. At least, as it was then understood—which meant the rule of the people who were then allowed by the laws of the various states to rule the people. They therefore commissioned the Framers, and the Framers considered themselves commissioned, to frame a form of government which would enable the will of these people to prevail so long as these people were governing the respective states. To be joined in time by such others as should be allowed to share in the government of the respective states. Hence, the significant provision of the United States Constitution that the electors of the House of Representatives should be the same as the electors of the more numerous branch of the legislatures of the various states. The general attitude of the Framers on the subject of democracy may best be illustrated by the wellknown anecdote, related also by Prof. Farrand in his work on The Framing of the Constitution:

"There is a tradition—says Prof. Farrand—that Thomas Jefferson some two years later, upon his return from France, was protesting to Washington against the establishment of two houses in the legislature. The incident occurred at the breakfast table, and Washington asked: 'Why did you pour that coffee into your

saucer?' 'To cool it,' replied Jefferson. 'Even so,' said Washington, 'we pour legislation into the senatorial saucer to cool it.'"

In other words, the majority of the Framers wanted the people's judgment to prevail, but they wanted the people's cool judgment. This is the theory upon which the Constitution was actually framed. And the reaction of which there is so much talk consisted mainly in the anxiety of the Framers to establish a strong government. And this meant to them two things: A legislature with plenary powers, and an independent executive. In so far as the legislature was concerned, their great anxiety was that it should have sufficient and ample powers, and not that it should have limited powers. The more "reactionary" or conservative the Framer was, the more was he concerned that the powers of the legislature should be ample.

Upon closer examination it will be found that most if not all of the statements expressing fear of the power of the legislature were uttered not in connection with a discussion of what powers ought to be granted to the legislature, but the discussion as to what powers ought to be granted to the other departments, particularly the executive, in order to protect them against "encroachment" by the legislature. In other words, the point was not a fear of government as such. Not a fear of there being many powers to be exercised by the legislature, nor of the power to pass laws affecting individual rights, but fear for the safety of the distribution of the powers, and a desire to prevent a concentration of all powers in the legislature. In other words, the fear was that the legislature might exercise not only unlimited legislative power, but also powers which are not properly legislative in their character, and which should therefore be exercised by either the executive or the judiciary. The fear of the legislature exercising judicial powers may not have been very strong-hence the comparatively few references to the legislative "vortex" in connection with the judiciary. But the fear that the legislature might exercise executive powers seemed to be both ever-present and well-founded in the experience of the State governments as well as in the tendencies of British governmental practice. It was the intention of the Framers to prevent this possible development in the government of the United States, and it is usually in this connection that fear of the legislative power was expressed.

Before leaving this absorbing topic of the intentions of the Framers of the Constitution, we must advert briefly to another person, and another incident which occurred at the Constitutional Convention. The person is Luther Martin, and the incident is the first introduction of the first draft of a clause in the Constitution which is considered by some writers of the greatest importance in connection with our subject; namely, that provision of the Constitution which now reads as follows:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

In order that our readers may understand the significance of this point, we must revert to the theory of constitutions as understood in all constitutional countries outside of the United States. According to this prevalent theory, a constitution is a direction to the government, and primarily to the legislative department of the government, and not a law in the technical sense of that word. Since it is considered that the interpretation of the constitution is not a judicial but a political question, the constitution being primarily a political document, for the violation of which the violators are responsible to the people only, and is therefore not a matter for judges to pass upon. Hence the judges are bound to execute all laws when properly adopted according to the forms of the constitution, irrespective of whether or not the legislature had, in their opinion, acted in accordance with the provisions of the constitution. But it is claimed on behalf of the Judicial Power, as it is known in the United States, that the Judiciary of the United States is placed in a different position, because of the particular wording of the paragraph of the United States Constitution just quoted. It is claimed that this provision makes the Constitution a "law" "of the land," like any other law, in the sense that it is cognizable by the Judiciary, but nevertheless superior to ordinary laws because it is a fundamental law.

Now, as to Luther Martin. Luther Martin is supposed to have been a profound believer in the Judicial Power, and is usually ranked next to Hamilton and Wilson in his importance as an upholder of the so-called American Doctrine. It so happens that Luther Martin was the one who proposed the resolution which subsequently became the paragraph in question. This resolution had no counterpart in the Virginia Plan, and was a modified form of one of the resolutions contained in what was known as the New Jersey Plan, which was introduced into the Convention in opposition to the Virginia Plan. The resolution as proposed by Martin was, however, adopted unanimously, and it read as follows:

"That the Legislative Acts of the United States . . . shall be the supreme law of the respective states . . . and that the judiciaries of the several states shall be bound thereby in their decisions, anything in the respective laws of the individual states to the contrary notwithstanding."

It will be noted that "the Constitution," upon the presence of which in this paragraph the Judicial Power is based, was entirely omitted from this resolution. The Legislative Acts of the United States, and not the Constitution, were to be the "Supreme Law" whereby "the judiciaries of the several states shall be bound."

If, therefore, we are to draw any inferences from the wording of certain clauses of the Constitution as to the intentions of the Framers, the Framer of this resolution certainly could not have intended the Judicial Power, for it would clearly have prevented the State judiciaries from paying any attention to the United States Constitution, and would have compelled them to enforce every act of the federal legislature, whether constitutional or unconstitutional. But even more important is the fact that there is no "law of the land" in this clause, but only "law of the respective states," and it therefore clearly has no reference to the federal judiciary. It is clear therefore that this clause was not introduced into the Constitution with the intention of putting the Judicial Power into it. In fact, in its first formulation it had a distinctly adverse bearing on that power. And since it was introduced by a supposed upholder of that power and adopted unanimously, its destructive effects upon the argument from the text of the Constitution is simply overwhelming.4

There has been considerable discussion of late about the supposed influence on the Framers, and the Revolutionary Fathers generally, of the theory of "natural rights," or Law of Nature, based on a notion of a higher law—the contention being that their adherence to this theory influenced the statesmen referred to in favor of the theory of judicial review as part of the American constitutional system. This is not the place to examine at length the question of whether or not our Revolutionary Fathers were much influenced by that theory. We have it on good authority that

the law of nature was never a part of English jurisprudence; and there is no reason for assuming that our Revolutionary Fathers, who had been brought up in the school of that jurisprudence, accepted it more readily than their English contemporaries or predecessors. But, however that may be, one thing is certain; and that is that insofar as the theory was at all accepted on the American continent during our revolutionary period, it was accepted as a revolutionary doctrine and not as a doctrine of constitutional law, either English or American, in the ordinary sense. This is strikingly illustrated by the fact that in the First Continental Congress, John Adams, who was then more revolutionary than the rest of that body, attempted to get that Congress to adopt a natural rights resolution, but was defeated by the more "constitutionally"-inclined majority. (See: James Truslow Adams, The Adams Family, p. 48.)

On the other hand, it must be remembered that after the Revolution, and even beyond the time of the adoption of the Constitution, the revolutionary principle as such was in some sort of vague way considered an American constitutional principle—to be kept, in reserve, and to be resorted to only as the dernier resort and not as a matter of ordinary constitutional practice. Much has been said in recent years by the supporters of the judicial power of the reactionary temper of the constitutional convention in support of the contention that they have provided for judicial review as a means of curbing the democratic tendencies of the time. We have elsewhere shown that the reactionary character of the constitutional convention has been greatly exaggerated. (See: infra Appendix D at end of Vol. 1) But we would like to point out here that even the more conservative members—who are the ones usually relied upon in support of the contention that the doctrine of judicial review was "put" into the constitution-adhere to this vague doctrine of revolution as part of our constitutional system. This is eminently true of James Wilson, the real founder of the doctrine of judicial review, even as late as 1891, when he was already an associate justice of the United States Supreme Court established under the Constitution. In his law lectures already referred to he said:

"This revolution principle—that, the sovereign power residing in the people, they may change their constitution and government whenever they please—is not a principle of discord, rancor, or war: it is a principle of melioration, contentment, and peace. It is a principle not recommended merely by a flattering theory: it is a principle recommended by happy experience. To the testimony of Pennsylvania—to the testimony of the United States I appeal for the truth of what I say.

"It is the opinion of many, that the revolution of one thousand six hundred and eighty-eight did more than set a mere precedent, even in England. But be that as it may: a revolution principle certainly is, and should be taught as a principle of the constitution of the United States, and of every State in the Union." (Works, (Andrews Edition) Vol. 1, p. 18.)

"In many parts of the world, indeed, the idea of revolutions in government is, by a mournful and indissoluble association, connected with the idea of wars, and of all the calamities attendant on wars. But joyful experience teaches us, in the United States, to view them in a very different and much more agreeable light—to consider them only as progressive steps in improving the knowledge of government, and increasing the happiness of society and mankind." (Ib. p. 343-344.)

CHAPTER VII

THE FIRST DECADE OF THE CONSTITUTION

HE fact of greatest significance in the history of the Judicial Power during the first decade of the Constitution is that the right to declare laws unconstitutional was never exercised during that period of storm and stress. It seems almost inconceivable that this right should not have been exercised during that strenuous period, if the courts had believed themselves possessed of the same. The government was practically in process of formation, each department feeling its way towards power. Partly for that reason, and partly for other reasons connected with the history of this country as well as events abroad, that period is rich in extraordinary events, and replete with controversies as to the nature of the government just formed and the distribution of powers thereunder.

If ever there was a time when the Legislature of the United States was likely to exceed its power, that was the time. And if it had been the intention of the framers of the United States Constitution and those who adopted it to lodge in the Federal Judiciary the power to declare acts of Congress unconstitutional, the Federal Judiciary would certainly have been remiss in its duty if it had not exercised it then. The failure to exercise that power during this formative period is, therefore, of extreme significance.

This significance becomes apparent when the history of the period is considered in some detail; and even more so when the rôle played by the Federal Judiciary during that period is examined. For not only did the Federal Judiciary take an active part in the political controversies of the time, but itself gave rise to some important controversies, even though it did not attempt to exercise the right to declare laws unconstitutional.

For no sooner did the United States Supreme Court open its doors for business than it rendered a decision which precipitated a constitutional crisis necessitating a constitutional amendment to upset that decision and insure the carrying out of the intentions of the framers of the Constitution.

The history of this case is interesting for many reasons—not the least because it illustrates the difference between what might be called political government on the one hand, and judicial government on the other. This case (Chisholm v. Georgia, 2 Dall. 419), which is famous in the history of the United States Supreme Court as well as in the history of the United States, is interesting also as the first illustration of the fact-since become familiar to lawyers, though still unknown to most laymen —that although our Constitution is written, its meaning is no more certain than the meaning of the British constitution, and that, therefore, to give the judges the power to declare laws unconstitutional does not mean to give them the power to merely dispense with a legislative act which is clearly against the Constitution, but in reality gives them the power to put their own meaning into the Constitution, and then to invalidate all laws which are not in conformity to that meaning.

During the struggle for the adoption of the United States Constitution, two important objections were urged with particular frequency—objections that seemed to be insuperable obstacles to its adoption. One was the absence of a Bill of Rights. The other was the fear entertained by many that the States themselves might

be sued like individuals in the new federal courts.

The first objection was met by a promise made by most of the leading advocates of the new Constitution, that the omission of a Bill of Rights would be remedied through the regular process of amendment as soon as the Congress should convene under the Constitution. The other objection was met by the assurance, given by practically all the leading men among the advocates of the Constitution, including the leading lawyers of the country, that the Constitution contained no provision which would enable individuals to sue a State in a federal court. This assurance was given, among others, by *The Federalist*.

In the same number of *The Federalist*, (No. 81), in which Hamilton answers the objections to the Constitution on the score of the powers of the Judiciary, discussed in the preceding chapter, he also refers to the question of the suability of a State in the federal courts. This issue of *The Federalist* was one of the last ones, and was evidently designed to answer the most important objections

which had arisen in the discussion of the new Constitution in various ratifying conventions and in the pamphlet literature. Therefore, having elucidated his views on the Judicial Power generally, so as to show that it was not intended to become superior to the Legislature but merely independent of it, Hamilton proceeds as follows:

"Though it may rather be a digression from the immediate subject of this paper, I shall take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds. It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation.

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

Such were the views of the great trio who wrote in *The Federalist* under the name of Publius. But they were not the only ones who held these views. On the contrary, they expressed the views of all the leading supporters of the Constitution, and were in the nature of an assurance to those who might be fearful of accept-

ing the new Constitution lest they be subjecting the States to the jurisdiction of the federal courts in suits by individuals. As Mr. Warren, the well-known historian of the United States Supreme Court, puts it:

"The right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to the successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted." (Charles Warren, The Supreme Court in United States History, Vol. 1, p. 91)

Practically as soon as the first Congress convened, the pledge given by the supporters of the Constitution with reference to the adoption of a Bill of Rights was redeemed. This took the form of the first ten amendments to the United States Constitution, which were initiated by the first Congress and put on their way toward adoption. Such was the manner in which was redeemed the pledge which the Legislative Department of the new government had to redeem.

But the other pledge or assurance, that with respect to the suability of the States in the federal courts, which only the courts could redeem, had a different history. No sooner did the federal Supreme Court open for business, than a group of suits were instituted by individuals against various States, on the very claims mentioned in the extract from The Federalist quoted above. John Jay, one of the trio responsible for that statement, was now Chief Justice of the United States Supreme Court. And practically the first case decided by the United States Supreme Court under Jay's Chief Justiceship was a violation of that pledge—the decision being exactly the opposite of the exposition of the Constitution given in The Federalist. Mr. Chief Justice Jay concurred with four of the Associate Justices in holding that the Constitution did give Federal Judiciary the power to summon the States before its bar to answer the suit of individuals for debts contracted in their sovereign capacity. One Justice only, of the six of which the Supreme Court was then composed—Mr. Justice Iredell—dissented.

The decision naturally aroused great indignation throughout

the country. We quote again from the historian of the United States Supreme Court:

"The decision—says Mr. Warren—fell upon the country with a profound shock. Both the Bar and the public in general appeared entirely unprepared for the doctrine upheld by the Court; and their surprise was warranted, when they recalled the fact that the vesting of any such jurisdiction over sovereign States had been expressly disclaimed and even resented by the great defenders of the Constitution, during the days of the contest over its adoption."

The country was not only indignant but stirred to its very depths. The House of Representatives of the State of Georgia, against whom the decision in the particular case was rendered, passed a bill providing that any Federal Marshal or other person who executed any process issued by the Court in this case, is to be declared "guilty of felony, and should suffer death, without benefit of clergy, by being hanged."

And Georgia was not the only State that was excited, although it was probably the only one which went to the extreme of passing that sort of law. How stirred the country was, can be seen from the fact that the very next day after the decision was handed down by the Supreme Court, a resolution was introduced in the national House of Representatives for an amendment to the Constitution counteracting this decision. The Senate was a little more tardy than the House, but finally the resolution for an amendment passed both Houses of Congress, and the amendment itself was adopted by the necessary three-fourths of the States, becoming the Eleventh Amendment to the United States Constitution. This amendment became part of the Constitution on January 8th, 1798.

Three things are to be noted in connection with this decision:

In the first place, it exemplifies the difference between the danger of a breach of faith with the people by the legislative or executive departments, on the one hand, and a similar breach of faith by the judicial department. Had Mr. John Jay acted in either a legislative or executive capacity as he acted in *Chisholm v. Georgia*, it is safe to say that he could not have survived politically the scandal which would have followed such action; and if he had acted as Executive, he would probably have had great difficulty in escaping impeachment. But he acted in the capacity of judge; and as such he was immune—that is, irresponsible politically; for theoretically, at least, he was but interpreting a legal

instrument according to his best lights. It is true he had seen other lights before, but it is the last light that counts. In other words, a statesman, whether legislator or executive, is supposed to know, when giving a pledge to the people in a case in which that pledge refers to the interpretation of the Constitution, what the Constitution means; and having given his pledge, he must abide by it. Should he have changed his mind in the meantime, he would, in a democratic government, probably have to resign or do something else to escape the actual breach of his pledge. But a judge can sit calmly on the Bench, repudiate the interpretation of the Constitution given by him previously, and then appeal to his judicial robe for protection—thereby escaping not only a possible penalty but even the obloquy which attaches to breaches of faith with the people.

The second thing to be noted in this connection is the extreme difficulty of amending the United States Constitution which has attended it since the very beginning. Here was a case where the country was practically unanimous, not only in condemning the action of the court, but in its determination that the action should be overturned as speedily as possible. Nevertheless, it took five years before that decision could actually be overturned by the adoption of an amendment to the Constitution. Such are the technical difficulties of amending our Constitution, which certainly have not grown less since the adoption of the Eleventh Amendment.

But the most important thing to be noted in connection with this decision, is the complete demonstration of the fact that he who has the final interpretation of a constitution is, in reality, the maker of it. There is nothing new in this, of course. This truth has been expressed long ago by Bishop Hoadly, and has never been questioned since.

"Whoever—said the wise Bishop—hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law-giver, to all intents and purposes, and not the person who first wrote or spoke them."

Theoretically, the people of the United States made the United States Constitution in the year of grace 1787. In reality, however, the Constitution has been in the process of making ever since the inauguration of our government—the real makers being

the judges, by reason of their power as its final interpreters, as we shall have occasion to see again and again, as we follow the growth of the Judicial Power.

Off-hand, it would seem that the question whether or not, under the United States Constitution, a State could be sued by an individual, is a very simple matter to ascertain from an examination of that document. But no legal document is simple when astute lawyers begin to apply their minds to it in an effort to find therein something they would like it to contain. And certainly, no constitution—which must, of necessity, be drawn in general terms—can be so simple as not to admit of various readings, when it comes to be considered not only by lawyers with their peculiar, legalistic ways of reasoning, but by people who may differ basically in the point of view from which they set out to read it. And the decision of the United States Supreme Court given in the first important case that came before it is an excellent illustration in point.

We know what the opinion of Mr. John Jay was on the point in question when the Constitution was before the country for adoption; and we also know what the opinion of Chief Justice Jay was when the same matter came before him for judicial interpretation. We have heard from Mr. Warren that most of the leading supporters of the Constitution were of the opinion that no such power as was asserted by this decision was given by the Constitution to the federal judiciary. Mr. Warren's statement may be considered rather an under-statement than an over-statement; for as a matter of fact, we know of no supporter of the Constitution who had expressed any different opinion while the Constitution was before the people. The five Associate Justices of the United States Supreme Court were all leading supporters of the Constitution while it was up for adoption. We must therefore assume that all of them were of the opinion expressed in The Federalist of which the Chief Justice was a collaborator. But only one dissented from the opinion of the majority. If we give Chief Justice Jay and his four associates credit for common honesty, as, of course, we must, we are forced to conclude that these five leaders in the legal profession must have changed their minds in a very short space of time. Therefore, not only does the Constitution mean different things to different men, but it may also mean different things to the same men at different times and under different circumstances. Without necessarily imputing dishonesty to the eminent judges

who decided Chisholm v. Georgia, we must conclude that the change in their opinion was due to a change in the position of the Constitution itself. The meaning of the Constitution had evidently changed because of the psychological effect upon the judges of the fact of its adoption.

One of the most interesting things in this connection is the fact that Mr. Justice James Wilson said that "so many trains of deduction, coming from different quarters, converge and unite at last on the same point"—namely, that a State must be suable by an individual in the federal courts under the Constitution—that we may safely assume such to be the legitimate result of the adoption of the Constitution. He then adds:

"This doctrine rests not upon the legitimate result of fair and conclusive deduction from the Constitution: It is confirmed, beyond all doubt, by the direct and explicit declaration of the Constitution itself."

Judge Wilson's statement in this first famous decision of the United States Supreme Court presents the phenomenon which has been repeated in practically every important case ever since: This power which practically all of the leading supporters of the Constitution, comprising almost all of the leading lawyers of the country, assured the country was not in the Constitution, has suddenly been found there, and not only by logical implication but by direct and "explicit declaration" of the Constitution itself. One is forcibly reminded in this connection of the famous dictum of Lord Holt about the British Parliament. Our readers will recall the statement of the famous Chief Justice that "an Act of Parliament can do no wrong, though it may do several things that look pretty odd." Of course, judges can do no wrong; but they certainly can do things that look pretty odd, to say the least. For one thing, they can see in a Constitution what nobody else can see in it, and what they themselves could not see there the day before. This is not meant to be a reflection upon the judges, but merely to call attention to the fact that judges are human beings, and-like all other human beings-have their biases and prejudices and preconceived opinions, of which they cannot divest themselves when construing constitutions, but which, on the contrary, are usually aroused by

¹The words "direct" and "explicit declaration" are italicized by Judge Wilson himself.

the subject matter involved in constitutional decision. Also, that "circumstances" alter not only cases but also constitutions; and that the "circumstances" which may alter constitutions are not necessarily objective, but may be subjective as well.

But while this carries no reflection upon the judges, it certainly carries an indictment against the system. For under this system every passing opinion of every judge who sits in a constitutional case may be engrafted upon the Constitution, so that all future generations become bound thereby—unless changed by special amendment or by some bold spirit among his successors on the Bench.

The indictment is particularly strong in the case of the Federal Constitution, and the Federal Judiciary, because that Judiciary is neither elected by nor responsible to the people, and that Constitution is practically unamendable.

This is perhaps the proper place to voice another objection to the Judicial Power, and that is: Because of the Judicial Power, which makes the courts the "supreme authority" in the land, all our governments, federal as well as state, are practically governments of lawyers. And lawyers, while a very proper ingredient of any government, are certainly not the proper class of persons from whom the entire government should be recruited. No class is good enough for that. But lawyers least of all. Their disqualification is due to the fact that they are by nature conservative, and by training used to looking backward instead of forward for light and inspiration, which makes their entire cast of thought and mode of reasoning somewhat one-sided: What was, must continue to be; that for which there is no precedent cannot possibly be any good.

No less an observer than De Tocqueville noticed nearly one hundred years ago both the fact that we are governed by lawyers and the special disqualification of lawyers for the job of exclusive governing just referred to. Under the heading "The Profession of the Law in the United States Serves to Counterpoise the Democracy," he makes the following observations in his Democracy in America:

"In visiting the Americans and in studying their laws—says he—we perceive that the authority they have entrusted to members of the legal profession, and the influence which these individuals exercise in the Government, is the most powerful existing security against the excesses of democracy. This effect seems to

me to result from a general cause which it is useful to investigate, since it may produce analogous consequences elsewhere. . . .

"Men who have more especially devoted themselves to legal pursuits derive from those occupations certain habits of order, a taste for formalities, and a kind of instinctive regard for the regular connection of ideas, which naturally render them very hostile to the revolutionary spirit and the unreflecting passions of the multitude.

"The special information which lawyers derive from their studies ensures them a separate station in society, and they constitute a sort of privileged body in the scale of intelligence. This notion of their superiority perpetually recurs to them in the practice of their profession; they are the masters of a science which is necessary, but which is not very generally known; they serve as arbiters between the citizens; and the habit of directing the blind passions of parties in litigation to their purpose inspires them with a certain contempt for the judgment of the multitude. To this it may be added that they naturally constitute a body, not by any previous understanding, or by an agreement which directs them to a common end; but the analogy of their studies and the uniformity of their proceedings connect their minds together, as much as a common interest could combine their endeavors.

"A portion of the tastes and of the habits of the aristocracy may consequently be discovered in the characters of men in the profession of the law. They participate in the same instinctive love of order and of formalities; and they entertain the same repugnance to the actions of the multitude, and the same secret contempt of the government of the people. I do not mean to say that the natural propensities of lawyers are sufficiently strong to sway them irresistibly; for they, like most other men, are governed by their private interests and the advantages of the moment. . . .

"The object of lawyers is not, indeed, to overthrow the institutions of democracy, but they constantly endeavor to give it an impulse which diverts it from its real tendency, by means which are foreign to its nature. Lawyers belong to the people by birth and interest, to the aristocracy by habit and by taste, and they may be looked upon as the natural bond and connecting link of the two great classes of society. . . .

"This aristocratic character, which I hold to be common to the legal profession, is much more distinctly marked in the United States and in England than in any other country. This proceeds not only from the legal studies of the English and American lawyers, but from the nature of the legislation, and the position which those persons occupy in the two countries. The English and the Americans have retained the law of precedents; that is to say, they continue to found their legal opinions and the decisions of their courts upon the opinions and the decisions of their fore-

fathers. In the mind of an English or American lawyer a taste and a reverence for what is old is almost always united to a love

of regular and lawful proceedings.

"This predisposition has another effect upon the character of the legal profession and upon the general course of society. The English and American lawyers investigate what has been done; the French advocate inquiries what should have been done; the former produce precedents, the latter reasons. A French observer is surprised to hear how often an English or an American lawyer quotes the opinions of others, and how little he alludes to his own; whilst the reverse occurs in France. There the most trifling litigation is never conducted without the introduction of an entire system of ideas peculiar to the counsel employed; and the fundamental principles of law are discussed in order to obtain a perch of land by the decision of the court. This abnegation of his own opinion, and this implicit deference to the opinion of his forefathers which are common to the English and American lawyer, this subjection of thought which he is obliged to profess, necessarily give him more timid habits and more sluggish inclinations in England and America than in France.

"The French codes are often difficult of comprehension, but they can be read by every one; nothing, on the other hand, can be more impenetrable to the uninitiated than a legislation founded upon precedents. The indispensable want of legal assistance which is felt in England and in the United States, and the high opinion which is generally entertained of the ability of the legal profession, tend to separate it more and more from the people, and to place it in a distinct class. The French lawyer is simply a man extensively acquainted with the statutes of his country; but the English or American lawyer resembles the hierophants of Egypt, for, like

them, he is the sole interpreter of an occult science . . .

"In America there are no nobles or men of letters, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class, and the most cultivated circle of society. They have therefore nothing to gain by innovation, which adds a conservative interest to their natural taste for public order. If I were asked where I place the American aristocracy, I should reply without hesitation that it is not composed of the rich, who are united together by no common tie, but that it occupies the judicial bench and the bar.

"The more we reflect upon all that occurs in the United States the more shall we be persuaded that the lawyers as a body form the most powerful, if not the only, counterpoise to the democratic element. In that country we perceive how eminently the legal profession is qualified by its powers, and even by its defects, to neutralize the vices which are inherent in popular government. When the American people is intoxicated by passion, or carried

away by the impetuosity of its ideas, it is checked and stopped by the almost invisible influence of its legal counsellors, who secretly oppose their aristocratic propensities to its democratic instincts, their superstitious attachment to what is antique to its love of novelty, their narrow views to its immense designs, and their ha-

bitual procrastination to its ardent impatience.

"The courts of justice are the most visible organs by which the legal profession is enabled to control the democracy. The judge is a lawyer, who, independently of the taste for regularity and order which he has contracted in the study of legislation, derives an additional love of stability from his own inalienable functions. His legal attainments have already raised him to a distinguished rank amongst his fellow-citizens; his political power completes the distinction of his station, and gives him the inclinations natural to privileged classes."

It is only necessary to add here to De Tocqueville's astute observations that he has much underestimated the evil results of government by lawyers, owing to his unfamiliarity or insufficient familiarity with the Judicial Power; for, as we shall see later, the only Judicial Power he was familiar with was the Judicial Power envisaged by Madison and Hamilton, and not that which we know. It goes without saying that the evils of being ruled by an aristocracy are incomparably greater when that aristocracy has the last word in the government, than when its decisions may be overruled by the people themselves.

Another thing to be noted in this connection is that the habit of mind of American lawyers and judges which makes them look backward instead of forward for guidance and inspiration—to precedent rather than to reason—is aggravated by the fact that under our system of jurisprudence, judges are supposed to be governed by the rule of stare decisis, whereby the decision of a majority of the court, no matter how small the majority and no matter how reasoned the opposition of the other judges, becomes a rule of decision binding in all future cases even on the minority which originally opposed it. Under this system, by a curious process of legalistic reasoning, which only legalistic minds can comprehend, judges are bound to disregard acts of the Legislature when they think that they are unwarranted by the Constitution, for their oath of office is supposed to require of them independence of judgment with respect to the meaning of the Constitution. But the same judges must submit to the opinion of a majority of their own

brethren on the bench as to the meaning of that same Constitution; and after a majority of the court has declared a certain meaning the minority who believe that interpretation to be wrong must apply it in all their future decisions.

And not only that, but theoretically always, and practically almost always, not only is the minority of the court bound to apply in all future decisions the rule established by the majority, but the court itself is bound to apply the rule thus established in all its future decisions, even though the majority of the subsequently sitting judges, or even all of them, should be of an opinion contrary to that established by the original majority.

Had the Eleventh Amendment not been adopted, Mr. Justice Iredell would have been bound by the rule of stare decisis to apply the doctrine of the majority in Chisholm v. Georgia in all his future decisions, even where he was the sole member of the court, as when on circuit, in spite of his own opinion of the true meaning of the Constitution; and the United States Supreme Court would have been bound to apply that decision forever afterwards throughout the history of the United States, even though the majority which decided Chisholm v. Georgia had been replaced by other judges, all of whom might be of a contrary opinion.²

The failure to use the power to declare laws unconstitutional during the period under consideration, is the more remarkable, because this period was peculiarly propitious for the exercise of such power by the political conditions of the time, as well as by the character of the Judiciary itself in its relation to the political life of the country. The newness of the government, the unavoidable differences of opinion as to the interpretation of the new Federal Constitution which immediately divided the country into two great political parties, and the great problems of foreign and of internal policies growing out of the turmoil into which the French revolution had thrown the entire world—all of this furnished material in abundance for the exercise by the Judiciary of its power. We know from the decision in the *Chisholm* case that the Judiciary was not backward in using all of the powers of which

²The doctrine of stare decisis is in direct conflict with the theory of a higher law, which is the basis of the right of judicial review. It is nevertheless part of our constitutional law, although individual judges and writers on the subject have, from time to time, protested against it. For a discussion of this subject see: Boudin, The Problem of Stare Decisis in our Constitutional Theory, VIII N. Y. U. Law Quarterly Review, 589.

it deemed itself possessed, which included many powers which many people believed it did not possess and which it exercised in opposition to the overwhelming opinion and desires of the people. The failure to exercise this particular power could not, therefore, be due to any lack of assertiveness on the part of the Judiciary, but only to a conviction that it did not possess it. A glance at the history of the period will prove this.

One of the early acts of Congress after the organization of the government which brought forward the question of the interpretation of the new instrument of government, was the bill for the establishment of a United States Bank. This project was brought forward by the famous report made by Alexander Hamilton, as Secretary of the Treasury, in December, 1790; and it immediately divided not only the country but also Washington's cabinet, in which it was opposed very strongly by Thomas Jefferson, Washington's first Secretary of State, on the ground that it was unconstitutional. In Congress the bill was strenuously opposed on the same grounds by a strong group, led by no less a person than James Madison—"Father of the Constitution" and erstwhile associate of Alexander Hamilton in the fight for its adoption.

The divisions in Washington's cabinet and in Congress were representative of the division of opinion in the country itself, which now, for the first time, became definitely divided into two parties, Federalists and Anti-Federalists.

But it never occurred to anybody to test the question of constitutionality in the manner in which all such questions are now tested—namely, by applying to the courts for an authoritative interpretation of the Constitution on this point. And it evidently never occurred to the Judiciary to tell the government whether or not it had the power to establish the United States Bank. It is one of the most remarkable facts in the history of the Judiciary of this country that the question of the constitutionality of a United States Bank was never passed upon by the United States Supreme Court during the entire existence of the first United States Bank—a period of twenty years. This is the more remarkable when contrasted with the fact that this question was passed upon by the United States Supreme Court only a few years after the establishment of the second United States Bank, the decision in that case becoming one of the most celebrated decisions rendered by Chief Judge Marshall, or ever rendered by the United States Supreme Court. But that was in 1819, fully a generation after the United States Constitution was adopted, and when the views of the people, including some of those who had originally opposed the establishment of the bank, had changed, owing to circumstances and conditions which will be discussed later. Even then all the court did was to approve what Congress did.

In the meantime the country, with the acquiescence of the Judiciary, believed that the question of the constitutionality of the Bank was up to Congress, the President, and ultimately to the people themselves. And the same was true during this period of all matters dealt in by Congress by way of legislation.

As already stated, there were plenty of matters in the new government, established after a revolution and existing amidst a world in turmoil, with an extremely complicated mechanism of its own, in which the Judiciary could play a decisive part politically if it so chose. And it did choose.

The first case of any importance decided by the United States Supreme Court, as already noted, had to do with the system of government established by the new Constitution, namely, the relation of the States to the new Federal Government. Of the next two cases decided by that Court, one had to do with the question of the revolution out of which the new nation in the New World arose, and the other with the revolutionary turmoil in the Old World and the feud between two old nations, France and England. In both of these decisions the Court showed that it was influenced largely by political considerations, and that the interpretation of the new Constitution was not merely a legal problem. And in one of them at least it showed its assertive character, and the fact that it was determined to play a rôle in the political life of the country even against great opposition.

Chisholm v. Georgia was decided at the February, 1793, term of the Supreme Court. The other two decisions were made at the February, 1794, term, a year later. These decisions were in the cases entitled, respectively, Georgia v. Brailsford, and Glass v. The Sloop Betsy. The first had to do with questions arising out of the confiscation laws passed against the Tories during the Revolution; and the second with the jurisdiction of the Admiralty Courts of the new Federal Government—a question which became of the greatest importance owing to the struggle between England and

France, and the great interest felt in this struggle by the people of the United States.

Let us hear what the noted historian of the United States Supreme Court has to say on the subject of the first of these two cases:

"After delivering its fateful decision in the Chisholm Case—says Mr. Warren—the Court rendered no further opinions for a year, owing to the fact that, at the time of its usual August Term, yellow fever was raging in Philadelphia. When it met for its February Term in 1794, a new Judge took his place on the Bench—William Paterson of New Jersey—whom President Washington had appointed on March 4, 1793, to fill the vacancy caused by the

resignation of Judge Thomas Johnson. . . .

"At this Term, only two cases were heard, but each was closely connected with vital political issues. The first, Georgia v. Brailsford, involved another phase of the question of State sovereignty and presented a curious history. . . . The decision had elicited from Randolph a pungent letter in which he expressed to James Madison decidedly uncomplimentary views of the Court: 'The State of Georgia applied for an injunction to stop in the Marshal's hands a sum of money which had been recovered in the last Circuit Court by a British subject whose estate had been confiscated. It was granted with a demonstration to me of these facts; that the Premier (Jay) aimed at the cultivation of Southern popularity; that the Professor (Wilson) knows not an iota of equity; that the North Carolinian (Iredell) repented of the first ebullitions of a warm temper; and that it will take a score of years to settle, with such a mixture of Judges, a regular course of chancery.' At the next Term in February, 1793, the Court, having decided the Chisholm Case against the contentions of Georgia, was evidently reluctant to rule against her a second time; hence on Randolph's motion to dissolve the injunction, while holding that Georgia's claim to the debt was a right to be pursued at common law and not by bill in equity, it decided to continue the injunction until this right might be determined at law in a suit by the State."

The second of these two cases was of much greater importance than the *Brailsford* case, and it involved not merely the injured feelings of a single state, but a matter which was exciting the entire country to a fever heat: Nothing less than the great struggle between England and France growing out of the French Revolution. The people were agitated by the struggle itself, some favoring one side and some the other. And they were even more agitated over the question of neutrality which the new government at-

tempted to maintain, and which it was so difficult to maintain. Not merely because both belligerent powers were trying to draw the United States into the struggle, but because of the eagerness of the people of the United States that the government take sides in this struggle, the only real division of opinion being as to which side the United States was to range itself on.

In this respect the situation was very much akin to that during the period of the World War preceding our own entry into it, when partisanship very often donned the sheep's clothing of peace and neutrality, and the advocacy of peace or of neutrality very often meant favoring one side or the other. At the particular moment of that struggle when The Sloop Betsy case came to the fore, it was assumed that neutrality favored England, and that President Washington's Proclamation of Neutrality, which gave rise to the case, was intended to favor that country, or at least that its results were favorable to that country. The pro-French or anti-English elements in the population were therefore opposed to a strict enforcement of the Neutrality Proclamation, and wanted the government to wink at its violations by the French government and by those citizens of the United States who favored the French side.

At this time probably a majority of the people were pro-French, and the French government took advantage of this fact by using the United States as a convenient base for fitting out privateers who were preying on English commerce with the assistance of citizens of the United States. The Sloop Betsy was one of these privateers, and the great question involved in the case was whether the federal courts had jurisdiction in such cases—there being no law of Congress on the subject. Those who opposed these practices asserted that, because of the President's Neutrality Proclamation, citizens of the United States were prohibited from engaging in them. They therefore demanded that these practices by citizens of the United States be neutralized by the federal courts assuming jurisdiction over the prizes brought in by these privateers into United States territory and restoring them to the owners as having been captured in violation of United States' neutrality; and that the citizens of the United States who violated the Neutrality Proclamation be prosecuted and punished in the federal courts. This raised the question whether such acts constituted offences cognizable in the federal courts. And back of

this question lay the question whether the English common law had been inherited by the United States Court, and whether federal judges could, in the absence of Congressional legislation, proceed to enforce this common law. The pro-French party, which was practically synonymous with the anti-Federalist party, vehemently denied the existence of such power in the federal courts, claiming that the federal courts could enforce only such laws as the United States Congress had adopted; and that the English common law, and particularly the criminal part of the English common law, was no part of the laws of the United States cognizable in the federal courts. The case of *The Sloop Betsy* involved this basic question of whether or not the English common law was part of the law of the United States cognizable in the federal courts, in so far as its *civil* or *admiralty* branch was concerned.

Before discussing this case, however, we must take note of another incident connected with this question, in which the United States Judiciary was called upon to act in this formative stage of its history.

Sometime after the issuance by President Washington of the Neutrality Proclamation on April 22nd, 1793, and while The Sloop Betsy case was in the lower courts, President Washington sought the opinion and advice of the judges of the United States Supreme Court on the legal phases involved in the enforcement of the Neutrality Proclamation in view of the existing treaties with England and France. It is said that Hamilton objected to referring the question to judges, on the ground that "the matter was not within the province of the judiciary," but that Jefferson favored it, and that Jefferson's advice in this respect prevailed with Washington. At any rate, at the direction of President Washington, Hamilton framed twenty-nine questions relating to international law, neutrality, and the construction of the French and British treaties; and Jefferson transmitted them with a letter for the consideration of the judges. But the judges refused to give the advice sought. This action of the judges has been praised by those who are in the habit of praising everything that the Supreme Court has done in the past, on the ground that by refusing to give opinions in advance, and waiting until the matters are brought before them in the form of actual cases, "the decisions of the Court on questions involving matters which have become the subjects of political controversy are much less likely to arouse suspicion

and distrust than if the Court exercised the power to decide such questions without litigation and argument by parties having a direct interest in the result of the decision." (Warren, op. cit. I, p. 111)

But this is clearly nonsense. If we are to be governed by the opinions of judges, it is certainly better that they should express their opinions at the time laws are passed, rather than years later, as is now usual. And subsequent history has shown the utter absurdity of our actual procedure, even if the Judicial Power in itself were the height of wisdom. The truth is, of course, that at the time the judges of the United States Supreme Court gave their answer declining to give advice, they did not consider our practice, for the simple reason that they could not foresee it, since the theory upon which it is based was then unknown. Washington sought not a judicial decision on the constitutionality of any Congressional law, but legal advice on action which he expected to take in his capacity of Chief Executive, and which involved our international relations and international laws.

And the decision in The Sloop Betsy case showed that the failure of the judges to give their opinions in advance was due to some other reason than a reluctance to pass upon anything that was not necessary for the decision of an actual case; for they went out of their way to decide a point which was not necessary to the decision of the case, and which counsel expressly declined to argue before them. In their decision the court overruled the lower courts which had held against the jurisdiction of the federal courts in these matters in the absence of Congressional legislation. The court then proceeded to inquire into the question—not necessary for the decision—of whether or not France had a right to establish Admiralty Courts within the United States; and made the announcement, intended to uphold the political hands of the administration, that the "Admiralty jurisdiction which had been exercised in the United States by the consuls of France" was improper.

But the people of the United States were evidently not interested in upholding the hands of the administration in this regard as much as was the United States Supreme Court. And they did not at all take kindly to the assumption by the courts of powers not given them by Congress. This was shown in the criminal

prosecutions growing out of the violation of the Neutrality Proclamation, in which the people had something to say.

While the various prize cases were pending in the District Courts of the United States, an indictment was found in Philadelphia against one Gideon Henfield, charging him with acting as prize master on the Citizen Genet, a French privateer fitted up in the United States, thus attacking and seizing ships of a nation with which the United States was at peace (England) in violation of the laws of nations and of the treaties and laws of the United States. Washington and his Cabinet took a great interest in the case. Hamilton himself drafted the indictment and aided in the trial. Attorney-General Randolph argued the case with the United States Attorney, William Rawle. Judges Wilson and Iredell of the United States Supreme Court sat with District Judge Peters, and Judge Wilson charged the jury with great positiveness that Henfield's act was punishable in the federal courts under the law of nations and the treaties of the United States, even though Congress had enacted no statute making the act a crime. In his charge to the jury, Judge Wilson said:

"This is a case of the first importance. Upon your verdict, the interest of four millions of your fellow citizens may be said to depend. . . . As a citizen of the United States the defendant was bound to keep the peace with all nations with whom we are at peace."

Judge Wilson then proceeded to point out that if citizens could take part in the war on one side they might take part on both sides, and that their friends who stayed behind also would not keep the peace, "and so civil war may result."

But notwithstanding the positiveness with which the law on the subject was declared, and despite the admonitions of the court as to the dreadful results which might follow an acquittal of the defendant, and in the face of the clear evidence produced against him, the jury acquitted Henfield, "amidst the acclamations of their fellow citizens."

And the "acclamations" were not confined to the "fellow citizens" of the Henfield jury in the city of Philadelphia, but were widespread—at least if we may judge by the newspapers of the time.

Another legal subject intimately connected with the basic

problem of the assumption of power by the judiciary to declare the English common law part of the law of the United States cognizable in the federal courts notwithstanding the absence of Congressional legislation, was the question of the right of expatriation, which was destined to play a more important part later on. In order to evade the provisions of the Neutrality Proclamation which prohibited American citizens from engaging in un-neutral acts, those who desired to assist the French agents in this country in the outfitting of privateers took to the practice of assuming French citizenship. To counteract this, the claim was brought forward by those who favored pro-British neutrality, that one could not voluntarily renounce his own and assume a new citizenship. In other words, they denied the right of "expatriation," as it was commonly called. The federal courts promptly upheld the claim on the ground that the English common law, which was by their declaration made the law of the United States, did not recognize the right of expatriation. This naturally served to enhance the opposition to the federal courts, who had now frankly made themselves an instrument of the Federalist party in carrying through the policies of the Washington administration, now become purely Federalist, and in riding rough shod over the sympathies of the people, and in ignoring the opinions of the many jurists and statesmen who opposed the unwarranted assumptions of power by the Federal Judiciary.

The political character of the Federal Judiciary came out more strongly in the district courts than in the Supreme Court, and particularly in the charges of the judges to grand juries on the subject of crime. This does not mean, however, that the judges of the Supreme Court were less partisan than the judges of the lower courts. At this time the judges of the Supreme Court were doing circuit duty and held district courts along with the district judges; and in these courts there was little distinction between the district judges and the Supreme Court judges. We have seen Judges Wilson and Iredell presiding at the Henfield trial, and how strongly Judge Wilson charged the jury in that case in favor of the prosecution, laying down the broad principle of law that a man could be convicted of crime in the courts of the United States although there was no Congressional legislation making his actions criminal. The same doctrine had been previously charged by Chief Justice Jay to a grand jury, and these subjects were not

the only ones on which the charges of the judges to the grand juries had aroused opposition; for it was the general practice of the judges to make political harangues to the grand juries in giving them instructions for guidance in their deliberations. This practice went to such lengths that even so great an admirer of the Federal Judiciary and so conservative a historian as Mr. Warren, is led to use the following language:

"Moreover,—says Mr. Warren—the constant practice indulged in by the Judges of the United States Courts of expressing their views on political issues in charges to the grand juries was regarded by the Anti-Federalists as an outrageous extension of judicial power. Jefferson termed it 'a perversion of the institution of the grand jury from a legal to a political engine.' 'We have seen Judges who ought to be independent, converted into political partisans and like executive missionaries pronouncing political harangues throughout the United States,' was the description of the situation given by an Anti-Federalist Congressman. This language was surely justified when a Judge of the Court deemed it proper to deliver a charge reported by the Federalist newspapers as 'truly patriotic' as follows: 'After some general reflections on the relative situation between the United States and France, the learned Judge went into a defence of the alien and sedition laws, and proved them, it is believed, to the satisfaction of every unprejudiced mind to be perfectly consistent with the principles of the Constitution and to be founded on the wisest maxims of policy. The Judge concluded with calling the attention of the Grand Jury to the present situation of the country and with remarks on the mild and virtuous administration of the government." (Warren, op. cit., I, pp. 165-6)

But while to the people at large these political charges to Grand Juries, and the use of the machinery of the courts for unpopular prosecutions, may have been the most important factor in arousing opposition to the federal courts, to the most thoughtful the gravity of the situation consisted in the unwarranted assumption of power by the Judiciary in constituting themselves law-makers on a grand scale by the adoption of the English common law without any Congressional action on the subject. And to the more liberal and democratic statesmen this procedure of the courts was particularly reprehensible, because the laws thus imported wholesale included some obnoxious doctrines which had become antiquated even in England. To us the chief importance of the decisions of the courts in these cases is twofold: In the first

place, they clearly demonstrate that the entire Federal Judiciary, including the United States Supreme Court, had in fact exercised unwarranted powers of law-making, for it is now established by decisions of the United States Supreme Court itself that there is no United States common law, and particularly that there is no criminal law of the United States in the absence of Congressional legislation. We thus have it established authoritatively by the United States Supreme Court itself that the entire Judiciary of the United States, from the Chief Justices down, were, during this entire period, enforcing a whole body of laws, including criminal laws, without the slightest warrant or authority either in the Constitution or the laws of the United States.

In the second place, it shows the danger of permitting the Judiciary to exercise the law-making power: For one of the doctrines thus unwarrantedly established by the Federal Judiciary at the time, was the doctrine that there could be no expatriation, an English doctrine thoroughly alien to the spirit of the people of the United States. This unwarranted assumption of power by the Federal Judiciary bore bitter fruit when, years later, England used this doctrine against the United States in the impressment of seamen, the ostensible cause of the War of 1812.

But all of this was still in the dim and more or less distant future. In the meantime, not only were the courts ready to do partisan service, but the party in power was ready to make of the Federal Judiciary a partisan instrument, and it looked upon the federal courts, including the Supreme Court, from a purely partisan point of view. This was brought out clearly in the questions of appointments, notably appointments to the Supreme Court.

When the first appointments were made there was very little discussion of the personnel. The Court was not then considered of any great importance, so the appointments practically went begging. And since there were no party divisions as yet, it was natural that the appointees should be taken from among the people who had advocated the adoption of the new Constitution and had been active in bringing about the organization of the new government. But by the time Washington's first administration came to a close and the new parties had been definitely formed, and particularly since it had become apparent that the courts may be made a great power in support of administration policies, the question of the

personnel of the Supreme Court became a matter of great interest among party politicians as well as in the country at large. This became apparent when John Jay, the first Chief Justice, resigned his office in order to become Governor of the State of New York. The Supreme Court was still very far from being the important tribunal that it is today—owing to the fact that its position as the "supreme authority" in our government had not as yet been thought of. This is shown by the very fact of John Jay's resignation. Certainly, no Chief Justice of the United States Supreme Court would today resign his position in order to become Governor of the State of New York. The position of the Supreme Court at that time is also indicated by the fact that prior to Jay's resignation, John Rutledge, one of the Associate Justices of the United States Supreme Court, resigned his position in order to become Chief Justice of his State—another event that could not possibly occur now.

Nevertheless, as already stated, the Court was important enough for the politicians to take notice of—and they did. When Jay resigned, Washington appointed John Rutledge, the former Associate Justice, who, as we have already seen, had resigned in order to become Chief Justice of his State; and Rutledge accepted the appointment. The commission was issued, and Rutledge came to Philadelphia, which was then the seat of the Supreme Court, and assumed his position as Chief Justice.

At the time when it was made, the appointment did not cause any discussion, as Rutledge had made an acceptable Associate Justice, and no one, evidently, thought his elevation to the Chief Justiceship anything out of the ordinary. But between the appointment and his assumption of the office an event occurred—or, rather, became known—which changed the entire situation. This was in the summer of 1795, when the Jay Treaty with Great Britain was the subject of much discussion, and feeling over it ran very high. It seems that shortly before Rutledge had received his appointment as Chief Justice he had severely criticized the treaty at a public meeting in Charleston, S. C., his home town. This had not been known either to Washington or anybody else in administration circles when the appointment was made. And when it became known it raised quite a storm. The administration leaders were up in arms, and all kinds of arguments were advanced against his confirmation by the Senate, including, among others,

that his attack upon the Jay Treaty was evidence of "insanity." Edmund Randolph, the Secretary of State, wrote from Philadelphia to Washington at Mount Vernon, on July 29th:

"The newspapers present all intelligence which has reached me relative to the treaty. *Dunlap's* of yesterday morning conveys the proceedings at Charleston. The conduct of the intended Chief Justice is so extraordinary that Mr. Wolcott and Col. Pickering conceive it to be a proof of the imputation of insanity."

Attorney-General Bradford wrote to Alexander Hamilton under date of August 4th:

"The crazy speech of Mr. Rutledge, joined to certain information that he is daily sinking into debility of mind and body, will probably prevent him receiving the appointment. . . . But should he come to Philadelphia for that purpose, as he has been invited to do, and especially if he should resign his present office, the embarrassment of the President will be extreme; for if he is discredered in mind and in the manner that I am informed he is—there can be but one course of prudence."

Timothy Pickering wrote to Washington on July 31st:

"The Supreme Court is to sit here next week, and perhaps the gentleman named for Chief Justice may arrive. Private information, as well as publication of his recent conduct, have fixed my opinion that the commission intended for him ought to be withheld."

And Oliver Wolcott wrote to Alexander Hamilton on July 28th:

"Everything is conducted in a mysterious and strange manner by a certain character here, and to my astonishment, I am recently informed that Mr. Rutledge has had a tender of the office of Chief Justice. By the favor of Heaven, the commission is not issued, and now I presume it will not be, but how near ruin and disgrace has the country been! Cannot you come and attend the Supreme Court for a few days next week?"

While he was thus the storm-centre of administration circles, Rutledge arrived in Philadelphia, took his oath of office, and assumed his seat as presiding officer of the United States Supreme Court, for the August Term then just beginning. Under the circumstances Washington could do nothing but send in his appointment to the Senate when it convened. But the fight was carried into the Senate—with the result that the confirmation was ac-

tually refused, this being the first instance of a nomination by the President having been refused confirmation by the Senate.

That this had absolutely nothing to do with Mr. Rutledge's alleged "mental debility" is quite certain, and it was made fairly clear by the organs of the Federalist party. The Columbian Centinel, an administration organ, wrote, when the decision of the Senate became known:

"This is as it should be, and what he ought to have expected, after the impudent and virulent attack he made on their characters. . . . The President, having appointed him ad interim before he knew of his late proceeding, was of necessity obliged to put him in nomination. But since it has been known how passionately he arraigned a measure before he had time to consider, or perhaps before he read it, he has been judged (all politicks apart) to be a very unfit person for a Chief Justice of the United States."

And William Plumer, an important cog in the administration wheel, wrote to Jeremiah Smith:

"The conduct of the Senate will, I hope, teach demagogues that the road to preferment in this enlightened country is not to revile and calumniate government and excite mobs in opposition to their measures."

The anti-Federalists naturally took the action of the Senate as an announcement to the country that none but supporters of the administration will be permitted to participate in the government, and that the Judiciary was to be made part of the party machine. This view was first stated tersely by William B. Giles in a letter to Jefferson:

"The rejection of Rutledge by the Senate is a bold thing, for they cannot pretend any objection to him but his disapprobation of the treaty. It is, of course, a declaration that they will receive none but tories hereafter into any Department of the Government."

But the rejection of Rutledge because of his attack on the Jay Treaty was merely one incident illustrative of the attitude of mind which dictated appointments to the United States Supreme Court during Washington's second administration. A short time prior to the Rutledge incident, and while the appointment of a successor to John Jay was under consideration, Washington's friend, James McHenry of Baltimore, recommended for any va-

cancy that might occur in the United States Supreme Court, Samuel Chase, at the time Chief Justice of the General Court of Maryland, and later an Associate Justice of the United States Supreme Court. Mr. Chase's career on the bench was such that we shall have to refer to him again later on. At this time we are interested not in Mr. Chase, but in the kind of argument used on his behalf with President Washington by his friend James McHenry, himself shortly thereafter to become a member of Washington's cabinet.

"Among the inducements I feel for presenting his name on this occasion-wrote McHenry to Washington-is his general conduct since the adoption of our government and the sense I entertain of the part he bore in the revolutionary efforts of a long and trying crisis. You know that his services and abilities were of much use to the cause during that period, sometimes by the measures he proposed or had influence to get adopted, and sometimes by the steady opposition he gave to the intrigues raised against yourself: . . . It is, Sir, after having weighed all these circumstances since our conversation respecting him, after having reflected upon the good he has done and the good that he may still do; after having debated within myself whether his political or other errors (which exist no longer) have been of such a cast and magnitude as to be a perpetual bar to his holding any office under the United States, after having considered the impressions which an appearance of neglect is apt to produce in minds constructed like his, that I have thought it a duty to mention him as a subject of consideration for present or future attention. . . . I need not tell you that, to his professional knowledge, he subjoins a very valuable stock of political science and information."

The same spirit is also evidenced by the kind of commendation which Washington's ultimate choice as successor to John Jay, after Rutledge failed of confirmation, Oliver Ellsworth of Connecticut, received from the administration supporters. Oliver Wolcott wrote to Jonathan Trumbull that Ellsworth's appointment, he being a staunch Federalist, "will be very satisfactory to all who are willing to be pleased. If our country shall be saved from anarchy and confusion, it must be by men of his character."

This attitude of regarding the United States Supreme Court merely as a governmental department, to be treated in the same partisan manner as any other governmental department, manifested itself in the filling of another vacancy on the Supreme Court bench which occurred about the same time, due to the resignation of Associate Justice Blair. We quote from Mr. Warren's Supreme Court:

"Before the Senate had acted on the Rutledge appointment, another vacancy on the Court occurred through the resignation of John Blair of Virginia in the early summer of 1795. . . . James Innes, the leader of the Virginia Bar, was strongly recommended for the Blair vacancy by John Marshall and by Washington's intimate personal friend, Edward Carrington. Since the President, through these two men, had already offered to Innes the position of Secretary of State and had considered him as Attorney-General, it was singular that he did not adopt their suggestion; but he wrote on December 23 to Carrington that: 'It had been expected that the Senate would not confirm the appointment of Mr. Rutledge, and so it has happened. This induced me to delay the nomination of a successor to Mr. Blair, as a vacancy in the Department of War is yet unfilled. I am waiting expected information to make a general arrangement, or rather, distribution of these offices, before I decide upon either separately.'

"Finally, Washington solved the problem by appointing Timothy Pickering of Massachusetts to the office of Secretary of State; . . . for the office of Secretary of War and Navy, he chose James McHenry of Maryland; . . . for the position of Attorney-General, . . . he chose Charles Lee of Virginia; the Chief Justiceship went to Oliver Ellsworth of Connecticut; and for the vacancy among the Associate Judges, he chose Samuel Chase of Maryland." (War-

ren, op. cit. I, pp. 141-2)

It was thus evident that Washington did not consider the appointment of a Chief Justice or Associate Justice of the United States Supreme Court in any different light than that of the appointment of any member of his cabinet. The Supreme Court, like the cabinet, was to be part of the administration, and the appointments to be viewed from that point of view. And evidently the first qualification for any one of these offices was staunch Federalism. Needless to say, all the other members of the administration so regarded these positions. We need only add here that from the very beginning geography was considered an important factor in making appointments to the United States Supreme Court.

This attitude towards the Judiciary became more pronounced as time went on, so that under Adams appointments to the Supreme Court were not only looked upon from the party point of view, in the sense that the appointees had to profess proper party-

political principles in the narrow sense, but they frankly became prizes with which to reward faithful service in support of the administration. This was strikingly illustrated in the selection of a new Associate Justice to fill the vacancy created by the death of Judge Wilson. This brought John Marshall for the first time in connection with the Supreme Court. When Judge Wilson died in August, 1798, the two prominent candidates for the position were Bushrod Washington, a nephew of George Washington, and Marshall. Marshall was not seeking the office at the time and, in fact, ultimately declined it, but his prominence as a member of the socalled X.Y.Z. mission to France led President John Adams to consider him for the office although he was not very eminent at the bar. This incident illustrates well both the geographical as well as the political considerations which at that time were determining appointments to the United States Supreme Court. We shall therefore quote at some length Mr. Warren's account of the same. Mr. Warren says:

"Marshall, while not as eminent at the Bar as several other lawyers of Virginia, had just returned from his mission with Pinckney and Gerry in France, and was now highly popular with the American people as a result of the revelation of the mysterious X.Y.Z. correspondence. Washington, who had studied law in Judge Wilson's office, though only thirty-six years of age, had already acquired a reputation as a profound lawyer and was recommended for the position by Attorney-General Lee. As Virginia had had no representative on the Court since Blair's resignation in 1795, President Adams determined that the appointment should go to that State, but he apparently thought that there was very little choice between the two candidates; for he wrote to Secretary of State Pickering: 'The reasons urged by Judge Iredell for an early appointment of a successor (to Wilson) are important. I am ready to appoint either General Marshall or Bushrod Washington. The former I suppose ought to have the preference. If you think so, send him a commission. If you think any other person more proper, please to mention him.' Pickering, in his reply giving his view of the possible candidates, wrote somewhat whimsically of 'B. Washington, a name that I have never heard mentioned but with respect for his talents, virtues and genuine patriotism. But he is young, not more, I believe, than three or four and thirty. His indefatigable pursuit of knowledge and the business of his profession has deprived him of the sight of one eye; it will be happy if the loss does not make him perfectly the emblem of justice.' To this Adams answered, September 26, that: 'The

name, the connections, the character, the merit and abilities of Mr. Washington are greatly respected, but I still think that General Marshall ought to be preferred. Of the three envoys, the conduct of Marshall alone has been entirely satisfactory and ought to be marked by the most decided approbation of the public." (Warren, I, op. cit. pp. 153-5)

That a judiciary so constituted and so regarded by its own friends should be considered as an engine of partisanship by the opponents of the administration is only natural; and it is in that light that it was viewed in Washington's second administration, and even more so during the administration of John Adams. In fact, the Federal Judiciary which had started out under very inauspicious circumstances owing to the decision in Chisholm v. Georgia, was becoming increasingly unpopular as time went on. The opposition to the Federal Judiciary reached its height during the agitation over the notorious Alien and Sedition Laws. But its unpopularity was due not to any one cause; nor was it the result of its attitude towards any one question. It was the sum total of its activities that was disliked by those who disliked the administration. It was during this period, because of a decision of the Supreme Court in another case, Bas v. Tingy, at the February term of 1800, that a public suggestion was made for the first time that the judges of the Supreme Court ought to be impeached. Mr. Warren thus describes the conditions under which that case was decided:

"The last Term in which the Court sat in the city of Philadelphia was held in August, 1800, and under great difficulties; for on August 4, when the session should have begun, only Judges Patterson, Moore and Washington were present; Chief Justice Ellsworth, who had been appointed Envoy to France by President Adams, February 25, 1799, was in Europe; Judge Cushing was ill; and Judge Chase was in Maryland, engaged in electioneering for Adams in the pending Presidential campaign." (Warren, op. cit. I, p. 156)

The Bas case also involved the question of neutrality, but under different conditions from the earlier cases. To favor "peace" and "neutrality" now, meant being pro-French; while to favor war or belligerency meant being pro-British. For the country was now almost on the verge of war with France. Congress had, in fact, during 1799, passed several acts looking toward such a possibility. One of these acts provided for the salvaging of ships "retaken from

the enemy within twenty-four hours." The question before the court in Bas v. Tingy was whether France was an "enemy" within the meaning of this statute. And the court held that it was, —holding that a state of "limited, partial war existed between the United States and France." This decision naturally evoked the applause of the Federalists, who desired war with France; and as naturally called forth the indignation of the anti-Federalists, who were now in favor of peace and neutrality. The Aurora, a leading organ of the Anti-Federalists, declared that the decision was "most important and momentous to the country, and in our opinion every Judge who asserted we were in a state of war, contrary to the rights of Congress to declare it, ought to be impeached."

Such was the condition at the end of the first decade of the existence of the Federal Judiciary, which coincided with the close of the century. Mr. Warren thus summarizes the situation of the United States Supreme Court at this time:

"With the close of this Term, the last to be held in Philadelphia, there came to an end a distinct period in the Court's history. For eleven years it had existed, formulating with comparatively little criticism the general principles of judicial procedure and of international and constitutional law on which its subsequent career was to be based. Thus far, it had been singularly free from hostile attack; but a great change in the attitude of the public towards the Court was now impending. The increasing rancors due to the existence of the British and French factions in this country and to the somewhat immoderate legislation of President Adams' Administration had aroused a furious spirit of partisanship. Into this boiling political caldron, the Court had been drawn during the past two years, by reason of the fact that all the delicate questions on which the Federalist and Anti-Federalist parties were so sharply divided-neutrality, Federal common law, criminal jurisdiction, the right of expatriation, the constitutionality of the Alien and Sedition laws-had been presented in cases arising before the Judges of the Court sitting on Circuit, and on each of these questions the decisions had been invariably adverse to the view held by the Anti-Federalists. The assertion of the jurisdiction of the United States Courts in cases involving criminal indictments based on English common law and on international law, in the absence of any Federal penal statute, had been especially obnoxious to the Anti-Federalists; and the successive cases had been regarded with growing alarm-principally because such common law indictments had been chiefly employed in convictions of persons accused of pro-French activities." (Warren, op. cit. I, pp. 158-9)

Mr. Warren's opening statements as to the lack of criticism of the federal courts during the early part of their existence must be accepted with important reservations, as the Court had met with very serious opposition from the moment it announced its decision in the Chisholm Case. It is true, however, that the opposition to the Supreme Court and to the Federal Judiciary in general was growing, and that the matter had by 1800 reached such a state that one is generally warranted in speaking of a decided change in the attitude of the public, since the amount of opposition had now increased so as to create practically a new situation—a situation in which the Court faced not only a hostile party, and that party in opposition to the existing administration, but a hostile country.

As already pointed out, the general hostility was due mainly to the concrete decisions of the various federal courts, particularly the decisions of the Supreme Court judges while sitting in the District Courts. But the hostility of the thinking portion of the country was not based on these concrete cases alone, but was due principally to the theory underlying these decisions—namely, the assumption of unwarranted powers, as evidenced by the declaration that there is a common law of the United States, to be enforced by the Federal Judiciary. The doctrine with respect to expatriation was very exasperating to the people at large; but to the discerning it was only part of a general system of law being introduced into this country by the Federal Judiciary without warrant in the Constitution.

In the fall of 1799, Chief Justice Ellsworth, while holding a session of the Federal District Court for the District of Connecticut, ruled in the case of *United States v. Williams*, in sustaining an indictment found against Williams for violation of the provisions of the neutrality law prohibiting American citizens from accepting commissions to serve a foreign power, that an American had no right of expatriation, since under the English common law no such right existed, and the common law was binding in the United States Court. In commenting upon this decision, the *Aurora*, already referred to, said:

"This opinion bends our necks under a foreign yoke. . . . We are not free, we are not an independent nation. . . . It is an erroneous and dangerous doctrine, unwarrantable, iniquitous and illegal. . . . The United States have no common law."

A writer in the Virginia Argus, addressed a letter to Chief Justice Ellsworth in which he said that:

"The rights of man have been arraigned, the dignity of the American people insulted, and their Constitution profaned by your decision . . . as unprecedented in its nature as momentous in its consequences. . . . From the moment of your exaltation, we have seen the fundamental principles of our government, the operation of its checks and balances disregarded and Judiciary independence exchanged for a timid servility."

Another Virginia paper said:

"The natural right formerly secured to the citizens of this State by law to expatriate themselves is abrogated; by what? Not by the Constitution of the United States, not by the laws made under it, but by the judgment of a Federal Court. An obsolete principle, applicable only to the personal right of the former feudal sovereigns of England, is enforced by a free republic founded on a total denial of all such rights. . . . This odious principle is now revived here after its abolition throughout modern Europe by the practice of near two centuries. . . . By the Chief Justice's opinion, we are still the subjects of Great Britain; we are so by this principle, her common law."

These may be considered the expressions of an excited populace, even though it may be the more intelligent part of it. But here is the deliberate and reasoned opinion of a leading statesman, the head of a great party, soon to be the head of the nation, and historically one of the greatest men this country ever produced. Thomas Jefferson, writing to Pinckney, said:

"I consider all the encroachments made on that (Constitution) heretofore as nothing, as mere retail stuff compared with the whole-sale doctrine, that there is a common law in force in the United States of which and of all the cases within its provisions, their Courts have cognizance."

And writing to Edmund Randolph, Jefferson said:

"Of all the doctrines which have ever been broached by the Federal Government, the novel one, of the common law being in force and cognizable as an existing law in their Courts, is to me the most formidable. All their other assumptions of un-given powers have been in the detail. The Bank Law, the Treaty Doctrine, the Sedition Act, the Alien Act, the undertaking to change the State laws of evidence by certain parts of the Stamp Act, etc., have been solitary, unconsequential, timid things, in comparison

with the audacious, barefaced and sweeping pretension to a system of law for the United States, without the adoption of their Legislature, and so infinitely beyond their power to adopt."

It is no exaggeration to say that history repeated itself here, and that the action of the Federal Judiciary played a great part in the so-called "Revolution of 1800," which forever destroyed the Federalist party, and put in power the Republican-Anti-Federalists, with Jefferson at their head. Nor was Jefferson's victory to be merely political or temporary. Not only were his enemies routed and destroyed forever, and his own party put into power for the next generation, but his own view of the Constitution was to be ultimately vindicated by the United States Supreme Court itself, and the principle firmly established that the English common law was no part of the law of the United States, and that no American can be convicted of crime in a Federal court except under the authority of an Act of Congress.

CHAPTER VIII

THE VIRGINIA-KENTUCKY RESOLUTIONS

S we have seen from Mr. Warren's remarks quoted above, the fight against the Judiciary reached its climax over the Alien and Sedition Laws. In one respect the opposition to the Judiciary over the Alien and Sedition Acts was somewhat different from that over the other acts which were unpopular with the people-namely, that its unpopularity was, in this instance shared with Congress. The Alien and Sedition Acts were no different from the other unpopular acts of the Federalist administration, and the Judiciary merely shared the unpopularity of that Administration. If there was any special grievance against the Judiciary, it was that the Judiciary should permit itself to be used as a partisan instrument. Notwithstanding, however, the fact that this agitation was not directed against the Judiciary as such, the agitation over the Alien and Sedition Laws has a peculiar interest for the historian of the Judicial Power, because this agitation raised for the first time the question as to who has a right to interpret the United States Constitution. It is true that the question was not raised from exactly the same angle as that which interests us in the present work-namely, the right of the judiciary to declare acts of its own co-ordinate legislature invalid and to impose its interpretation of the Constitution upon the co-ordinate branches of its own government. The question in this case did not arise between the Federal Judiciary and Congress, but between the Federal Government and the States. The major question presented was: Who has a right, under the Constitution, to lay down the boundaries between Federal and State competency. And if this question were resolved in favor of the Federal Government, the further question presented itself, whether the judiciary could exercise that power on behalf of the Federal Government.

The Alien and Sedition Acts were passed in 1798 as part of the foreign policy of the Adams Administration, which, as already stated, drifted towards war with France. The Alien Act was applicable to all aliens, but it was directed primarily against French or pro-French alien agitators; while the Sedition Act was directed against French sympathizers among American citizens. Both acts were very drastic in their provisions, and are now generally believed to have been unconstitutional. But at the time, one's opinion as to whether these acts were constitutional or not depended on the party to which one belonged—the Federalists being quite certain that they were constitutional, while the Anti-Federalists were no less certain that they were unconstitutional.

It is said that John Marshall strongly advised against the passage of these laws, but there is no record as to the reason for his advice—whether he opposed them because he believed them to be unconstitutional, or unjust, or merely impolitic.

The Alien Act became law on June 25th, 1798, and the Sedition Act on July 24th, of the same year; and the Adams Administration immediately proceeded to enforce them with a ruthlessness which aroused universal opposition among those not committed to the Federalist policies. The Alien Act could be enforced by executive order and therefore did not affect the Judiciary. The Sedition Act, on the other hand, had to be enforced through the courts, thus drawing the Judiciary into the turmoil of partisan politics. The courts quite uniformly held these acts constitutional, and enforced them rigorously.

When these Acts were under discussion in Congress, they were attacked very vigorously by all of the Anti-Federalist members of Congress, some of whom were very eminent jurists, as palpably unconstitutional. Among those who so attacked them was Edward Livingston-later President Jackson's Secretary of State-who was then already pre-eminent for his legal attainments, and subsequently attained international fame as a jurist of very high standing. There were, of course, well known lawyers among the Federalists, and these, or at least most of them, considered these Acts constitutional; but their opinion as to the constitutionality of these acts depended, in the last analysis, on their belief that the English common law was part of the common law of the United States—an opinion which, as we have already seen, was then upheld by the United States Supreme Court, but has since been repudiated by that Court itself, and is now universally recognized as having been erroneous. It may therefore be taken as settled that those laws were unconstitutional.

By this time the struggle between the two parties, the Federalist and the Anti-Federalist, or Republican, as the latter party gradually came to be known, assumed a somewhat geographical character, at least in so far as the "better elements," or leading politicians, were concerned.

In Massachusetts and the North generally, the "better elements," from which were naturally recruited their statesmen, politicians, and office holders, were Federalist; while the "lower orders," particularly in the "back country" or agricultural regions, were strongly Anti-Federalist, as the presidential elections of 1800 were soon to show. On the other hand, Virginia and the South generally were Republican. When the opposition to Adams' administration over the passage and enforcement of the Alien and Sedition Laws became more or less general, it was naturally expected that Virginia, then the foremost State in the Union, would take the lead, just as it had done in the framing and adoption of the new Constitution, and in the organization of the new government. Such, however, was the great change which had occurred in a little less than a decade, that the State which had led in the formation of the new Constitution and government, and had given the first President and a large proportion of the personnel of the new Federal Government, was now to lead the opposition. While Massachusetts, which had taken only a subordinate part in the framing and adoption of the Constitution, and was in the beginning rather lukewarm towards the new government, was now "The Government." New York, as befitted its geographic position between Massachusetts and Virginia, was divided, just as she had been at the time of the framing and adoption of the Constitution.

It must not be assumed, however, that party divisions coincided exactly with geographic position, but merely that Federalism predominated in the Northern States, while Anti-Federalism predominated in the Southern States. There were, of course, Anti-Federalists in the North, even in Massachusetts. And there were Federalists—in fact, quite a respectable number of them—in Virginia and the Southern States generally. The Virginia Federalists were, in truth, still a power to be reckoned with. If not exactly for their numbers, at least for their importance. George Washington, foremost citizen of the United States notwithstanding the fact that John Adams was now President, was a staunch Federalist. So was Patrick Henry—although he had opposed the

adoption of the Constitution as not democratic enough. And there was John Marshall, who, although not yet the great man he was subsequently to become, was already rising on the political horizon. Aside from these, there were a great number of persons eminent in their day—some of them at that time much more important than John Marshall,—whose names, however, would carry no particular significance now except to special students of the political history of that time.

But Virginia also had at this time, among her citizens, two men who had already played an important part in the history of the country, and who were destined to play an even more important one in the future—Thomas Jefferson and James Madison. One the author of the Declaration of Independence, and the other the Father of the Constitution, and each soon to be President of the United States. But more important than their future prospects for the presidency was their present pre-eminence as leaders of the Republican party. It was to Virginia, then, that all eyes turned at this juncture, and it was from Virginia that the lead came. It came in the form of the Virginia and Kentucky Resolutions. The preliminary history of these resolutions is somewhat obscure. There are those who believe that they were drawn and introduced into the respective legislatures of Virginia and Kentucky as part of a prearranged plan between Jefferson and Madison and their associates. On the other hand, there are those who believe that the Virginia group acted independently of the Kentucky group, although there may have been some correspondence between them and a general understanding that some action would be taken.

The historical fact is that the two sets of resolutions were introduced into the respective legislatures of the two States about the same time, Kentucky being somewhat ahead of Virginia. It is commonly believed that Jefferson was the author of the Kentucky resolutions, although this has been disputed and their authorship ascribed to the man who introduced them in the Kentucky legislature, John C. Breckinridge—a rising lawyer and politician destined to go far within the next few years.

There is no doubt as to the author of the Virginia resolutions. They were drawn by James Madison, although introduced into the General Assembly of Virginia by John Taylor, a leading Anti-Federalist and a noted lawyer and scholar. But Madison's name was destined to be linked more closely with the Virginia resolutions

than would have resulted from mere authorship. After the adoption of the respective sets of resolutions by the two States, it was natural for the Virginia resolutions to become the more important, Virginia being by far the more important of the two States. The states to whom both sets of resolutions were communicated usually took particular notice of the Virginia set, so that they became the storm-centre of the agitation. It was only natural that the people of Virginia should be particularly concerned about these resolutions. As a result, these resolutions became one of the principal issues during the next election to the Virginia Assembly, and Madison himself was induced to stand for election to the legislature in the expectation that the next session of the legislature would see some action either for or against these resolutions. Patrick Henry was similarly induced to become a candidate for the legislature on the other side, but he died before the convening of the next legislature, so that he did not participate in the fight which resulted in the famous Report.

One of the first things done by the new legislature was to appoint a committee, with James Madison as chairman, to draw up a report on the resolutions adopted the preceding year and the replies which had been received from the legislatures of some of the other States. This report was drawn up by James Madison, and became known as the Madison Report, or the Virginia Report of 1799. The importance of Virginia as a State and the importance of this Report as a State document made the Virginia Resolutions by far the more important historically, in so far as this period of American history is concerned. Although the Kentucky Resolutions were destined to acquire additional fame as the precursors of the Nullification Resolutions passed by South Carolina a generation later. From the point of view of the subject here under consideration, the Virginia Resolutions are by far the more important, both on account of their own tenor as well as because of Madison's Report concerning them. We shall therefore discuss them at length, and refer to the Kentucky Resolutions only incidentally.

Before proceeding to a discussion of the Virginia Resolutions in detail we shall note here two things. It seems to us unlikely that the two sets of resolutions were the result of any prearranged plan, in so far as the actual wording of the resolutions themselves is concerned. For they show very marked differences, not only in

phraseology, but in the point of view from which the subject is treated, and to a certain extent even as to the theory of government therein expounded. It is therefore more likely that the Virginia and Kentucky groups having agreed on a course of action, it was left to each group to draw up its own resolutions, embodying its own particular views of the Constitution and of the nature of the Federal government under it. Another thing to be noted is that, if it be true that Jefferson was the author of the Kentucky resolutions, then his theory of the Constitution and that of Madison did not exactly coincide.

The Kentucky resolutions laid much more emphasis on the States as part of our governmental system than did the Virginia resolutions, and the theory underlying the Kentucky Resolutions undoubtedly had some kinship with what subsequently became known as the Nullification theory. This accounts for the fact that during the struggle over "Nullification" the Kentucky Resolutions were brought forward instead of the Virginia Resolutions, although the latter were undoubtedly the more important historically—that is, when considered as of the time of their adoption. Both sets of resolutions were meant to meet the same situation. Both, therefore, united in denouncing the Alien and Sedition Acts as unconstitutional. Both united also in expressing the sentiment that the State legislatures had not only the right to "declare"—in the sense of expressing an opinion—an act of Congress unconstitutional, but also that it was up to the States as States, and therefore to the State Legislatures as representatives of the sovereign will of the States, to take steps towards remedying the situation. Just what those steps were meant to be has been matter of much dispute ever since.

On the one hand, it has been said that those resolutions in effect stated that each State had a right, having declared an act of Congress unconstitutional, to prevent its execution within its own borders by force if necessary. On the other hand, this has been denied, both then and subsequently, by Madison as well as by his associates. There is a very interesting letter on the subject written by James Madison in August, 1830, when the Nullification agitation was at its height. The subject of "Nullification" not being within the purview of this work, we may pass over this subject with the remark that a reading of the Virginia Resolutions undoubtedly justifies Madison's claims that no Nullification doc-

trine was intended to be promulgated by these resolutions, and that force was not among the means considered proper in order to meet the emergency of an unconstitutional act of Congress. The Kentucky Resolutions are not quite so clear on this subject; but for the reasons already stated we need not inquire further into this phase of the subject. The question of the means wherewith a State may proceed to redress its grievances against the Federal Government cannot possibly arise until the question of the distribution of governmental functions within our political system has been determined. And the question of the Judicial Power lies at the threshold of that problem.

As already stated, the question directly involved in these resolutions was not that of the Judicial Power, which interests us particularly in this work, but rather the question as it is involved in disputes between the national and state governments. But incidentally the general question came into the discussion; and the general doctrine of the Judicial Power was first put forward as the official Federalist doctrine of the Constitution in the course of this discussion. One thing must be noted, however, in this connection: The denial of the exclusive power of the Federal Judiciary to interpret the Constitution in matters of dispute between the Nation and the States,-which is the position of the Virginia and Kentucky Resolutions,-of necessity involves the denial to the judiciary of the exclusive right to interpret the Constitution as against a co-equal department of government. But the converse proposition is not necessarily true—for one may admit the exclusive right of the National Judiciary to be the final arbiter in question of interpretation of the Federal Constitution as against a State, without admitting that it has the same power as against the national legislature.

The question of the constitutionality of the Alien and Sedition Laws was argued not from the angle of the power of a legislature to pass such laws as against the people, but from the angle of the right of the national legislature to pass such laws as against the States. The question was examined not from the point of view of the rights of the people, but from the special angle of the distribution of powers and the rights of the States. Although the prohibition of the First Amendment to the United States Constitution against abridging the freedom of the press was naturally cited against the Sedition Act, as being an additional objection—addi-

tional to the main objection that the law was an encroachment upon the proper domain of the States. It should also be noted here that objection was raised to the Alien Act particularly as violative of the principle of the distribution of the powers of government.

The salient portions of the Virginia Resolutions read as follows:

"That this Assembly doth explicitly and peremptorily declare that it views the powers of the Federal Government as resulting from the compact to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact; as no further valid than they are authorized by the grants enumerated in that compact; and that, in case of a deliberate, palpable, and dangerous exercise of other powers not granted by the said compact, the States who are the parties thereto have the right and are in duty bound to interpose for arresting the progress of the evil and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them.

"That the General Assembly doth also express its deep regret that a spirit has in sundry instances been manifested by the Federal Government to enlarge its powers by forced constructions of the constitutional charter which defines them; and that indications have appeared of a design to expound certain general phrases (which having been copied from the very limited grant of powers in the former Articles of Confederation, were the less liable to be misconstrued), so as to destroy the meaning and effect of the particular enumeration which necessarily explains and limits the general phrases; and so as to consolidate the States by degrees into one sovereignty, the obvious tendency and inevitable result of which would be to transform the present republican system of the United States into an absolute, or, at best, a mixed monarchy.

"That the General Assembly doth particularly protest against the palpable and alarming infractions of the Constitution in the two late cases of the 'Alien and Sedition Acts,' passed at the last session of Congress; the first of which exercises a power nowhere delegated to the Federal Government, and which, by uniting legislative and judicial powers to those of executive, subverts the general principles of free government, as well as the particular organization and positive provisions of the Federal Constitution; and the other of which acts exercises, in like manner, a power not delegated by the Constitution, but on the contrary, expressly and positively forbidden by one of the amendments thereto—a power which, more than any other, ought to produce universal alarm, because it is levelled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right."

The resolutions were introduced into the Virginia House of Delegates on December 13th, 1798, and the debate lasted over a week. The resolutions were finally adopted by the House of Delegates on December 21st by a vote of 100 to 63, and by the Senate on December 24th by a vote of 14 to 3.

Perhaps the most interesting thing about the debate is the fact that the judiciary was not referred to until towards the close of the debate, on December 20th, to be exact, after the debate had been in progress for a full week. Then it was first mentioned by one of the speakers, Gen. Henry Lee, who concluded a long argument designed to prove the constitutionality of the laws under consideration, by saying, according to the report:

"Admitting for a moment, that the laws were unconstitutional, he contended that the course pursued by the resolutions was inadmissible. Prudence frowned on the indecorum and hostility which their face showed, nor was it to be presumed that contumely to the sovereignty of the Union was the likeliest way to obtain a repeal of the laws. . . . But why not wait for the operation of the constitutional checks? The united system was made by the whole people, for the management of all affairs national. The same people instituted state governments, for the management of all state affairs. These systems held concurring jurisdiction over some subjects, and of course might occasionally interfere. Who, then, was the proper arbiter between them? Not the state government: the people had given them no such power. The people themselves, the creators of both systems were the proper judges. Their decision was obtainable under the rules of the Constitution in the revolving elections. The judiciary also was a source of correction of legislative evil; a source fixed by the Constitution, and adequate to cure violations of the same like those now alleged."

This rather indecisive reference to the judiciary was not followed up by all of the subsequent speakers, the remark being evidently considered incidental and not at all decisive on the point at issue. Some of the more important speakers, however, who followed General Lee did advert to it. The first to take note of General Lee's reference to the judiciary was John Taylor, the able proponent of the resolutions, who in a speech delivered the same day, said:

"With respect to the remedy proposed in the talents and integrity of the continental judges, without regarding the prejudices which might probably exist in favour of the government, from which an appointment should flow, it might be remarked, that the judges by the Constitution are not made its exclusive guardians."

This direct challenge was not accepted by the Federalist opponents of the resolutions, although later in this debate Mr. George K. Taylor came to the support of his colleague General Lee. On the day following the latter's speech, Mr. Taylor said, in the course of a rather lengthy speech:

"If any act passed by Congress be unconstitutional, the judges of the federal courts who are unbiassed by party, and unwarped by prejudice, and who are selected for their superior talents and integrity, afforded a constitutional check upon the legislature. The people themselves are another most powerful check; for they will know the vote of their representatives, and if they deem the law for which they voted to be unconstitutional, they will order them to depart at the ensuing election, and replace them with others more wise and more virtuous."

But even this half-hearted reference to the Judicial Power was not permitted to go unchallenged by the supporters of the resolution. It was answered on the same day in a speech made by William B. Giles, a well-known lawyer, subsequently to become a leading United States Senator and an important cog in the wheel of Jefferson's administration, thus:

"But it had been said, that on this occasion a resort must be made to the judiciary and to the people. Why so? The members of this Assembly have taken the same oath to support the Constitution as the judiciary and the people. It became then as much their duty to support it, as it was that of the others."

That was all that was said during the entire lengthy and momentous debate on the subject of the Judicial Power. The Federalist opponents of the resolutions were, as we have seen, rather lukewarm in the avowal of their belief in the Judicial Power, even as between the Nation and the States, and at no time asserted its exclusiveness even when directly challenged by the other side. The utmost of their claim was to couple the Judiciary with the people, as one of two checks provided by the Constitution against unconstitutional legislation. The ultimate decision, even according to these Federalists, was evidently with the people, who were to pass, "at the ensuing elections," not only upon the wisdom but also upon the constitutionality of legislation. This is in striking

contrast to the resolutions adopted by the Massachusetts legislature, and other legislatures controlled by the Federalists, in replying to the Virginia Resolutions.

Evidently, not only was the prevalence of Federalism or Anti-Federalism a matter of geography, but geography also determined the content of Federalist doctrines, at least as far as the Judicial Power was concerned. In northern latitudes, the Federalist doctrine demanded a thorough belief in the Judicial Power and in its exclusiveness as the interpreter of the Constitution, at least in matters of dispute between Nation and State; while in more southern latitudes this doctrine was not rigidly adhered to, and the Judiciary was not claimed to be the exclusive arbiter, and was recommended chiefly not because of the power granted to it by the Constitution but because of its respectability. It is interesting to note in this connection that no less an authority than The Federalist was appealed to by one of the speakers, Mr. Mercer, who had been a member of the Federal Convention, in support of the doctrine that the States had the right to declare an act of Congress unconstitutional; which, of course, excluded the idea of such an exclusive power of interpretation having been given by the Constitution to the Judiciary alone. He said:

"The opinion contained in the resolutions was coeval with the Constitution itself, and had been maintained by the most enlightened commentary which had been produced in America upon that instrument (he alluded to a collection of papers written under the signature of Publius, in the State of New York), when the Constitution was under consideration, and generally known by the name of the Federalist. The union of talents exercised in the production of this work had justly entitled it to the attention of every American who is anxious to know the true meaning of the federal Constitution, and the real intent of its powers; and though some of its opinions may be erroneous, it was still the best authority that could be produced. The time of its being written was extremely favorable to the impartiality of its sentiments, as that vindictive party spirit which had now so unhappily extended its baneful influence to almost every individual in the community, could not have affected its supposed authors, one of whose merits had so justly been resounded a few days ago from every side of this house. This authority, when speaking of the checks which the state governments would always have upon the general government, and of the little probability of the latter engrossing powers unobserved, uses the following strong and decided language: 'If

the majority (in the general government) should be really disposed to exceed the proper limits, the community will be warned of the danger, and will have an opportunity of taking measures to guard against it. Independent of parties in the national legislature itself, as often as the period of discussion arrived, the state legislatures, who will always be not only vigilant, but suspicious and jealous guardians of the rights of the citizens against encroachments from the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if anything improper appears, to sound the alarm to the people, and not only to be the voice, but, if necessary, the arm of their discontent."

Mr. Mercer's point is clearly well taken. The quotation from *The Federalist* is apt. Clearly, the authors of *The Federalist* did not conceive of the Judiciary as the exclusive *interpreter* of the Constitution.

Another interesting point about this debate is that Mr. George K. Taylor, the leader of the opposition, in presenting the argument in favor of the constitutionality of the Sedition Law, stated the legal foundation of the claim of constitutionality as conceived by the Federalist statesmen in a manner as to admit its actual unconstitutionality in view of the subsequent decisions of the United States Supreme Court. In the course of his argument, Mr. Taylor said:

"They (Congress) may consequently make laws respecting the press, provided they do not abridge its freedom. To abridge the freedom of the press was to impose upon it restraints or prohibitions which it did not experience before; or to increase the penalties attached to former offences accruing from its licentiousness. If then the sedition-law does impose upon the press restraints or prohibitions which it did not experience before that act was passed, or if it increases the penalties attached to former offences arising from its licentiousness, it was conceded to be unconstitutional.

"But it had been demonstrated that the common law embraces and attaches itself to the constitution and government of the United States; and that it punishes with indefinite fine and imprisonment the writing, uttering, or printing false, scandalous, and malicious libels. When the act in question, then, only punished the same false, scandalous, and malicious writing by fine and imprisonment to a definite amount, and for a definite period, it does not impose upon the press restraints or prohibitions which it did not experience before, nor does it increase former penalties; it therefore does not abridge its freedom, and is consequently constitutional."

In other words, the question of the constitutionality of the Sedition Law depended on the English common law, including its criminal branch, being the law of the United States without any legislation by Congress. If the English common law was part of the law of the United States, then the Sedition Law was constitutional, because it did not increase the penalties for the "licentiousness" of the press, since the penalties under the English common law were much more severe than those imposed by the Sedition Act passed by Congress. The act was therefore in the nature of an amelioration of the penalty rather than an abridgment of an existing right. On the other hand, if the English common law was not part of the laws of the United States without any action on the part of Congress, the acts which were made criminal by the Sedition Act were not criminal until made so by that Act. And in such event, this able and staunch Federalist conceded the Act to be unconstitutional. The United States Supreme Court has since definitely and irrevocably committed us to the doctrine, which is now incontestable in our jurisprudence, that there is no common law of the United States, and particularly no criminal law of the United States except by Act of Congress. From our present-day knowledge of the law as laid down by the United States Supreme Court, the Sedition Law at least was unquestionably unconstitutional.

The five New England States and the State of Delaware passed resolutions in opposition to the Virginia Resolutions. And New York was divided on the subject, the Senate passing a resolution in which the Assembly refused to concur. These opposition resolutions are interesting as indicative of the state of mind of the country. We shall therefore pass them in brief review.

The first to pass its resolution on the subject was the State of Delaware, the date being February 1st, 1799. This resolution is very brief. It reads as follows:

"RESOLVED, By the Senate and House of Representatives of the State of Delaware, in General Assembly met. That they consider the Resolutions from the State of Virginia, as a very unjustifiable interference with the general government and constituted authorities of the United States, and of dangerous tendencies, and therefore not a fit subject for the further consideration of the General Assembly."

No suggestion here that the question of unconstitutionality is a subject for the judiciary exclusively.

The State of Connecticut also passed a very brief resolution. Its main section reads as follows:

"RESOLVED, That this Assembly views with deep regret, and explicitly disavows, the principles contained in the aforesaid resolutions, and particularly the opposition to the 'Alien and Sedition Acts'—acts which the Constitution authorized, which the exigency of the country rendered necessary, which the constituted authorities have enacted, and which merit the entire approbation of this Assembly. They, therefore, decidedly refuse to concur with the legislature of Virginia in promoting any of the objects attempted in the aforesaid resolutions."

Nothing in here, either, about the exclusive power of the judiciary to interpret the Constitution. On the contrary, the State Legislature of Connecticut evidently thought itself competent to pass upon the subject and to express its views irrespective of any judicial decision.

Not so the legislature of the State of Rhode Island. This legislature was the first to declare that the question involved was one for the Federal Judiciary; and its resolution is so worded as to imply that the exclusive power of the Federal Judiciary to interpret the Constitution does not apply merely to one like that then under consideration, but to all questions arising under the Constitution. The main section of this resolution reads as follows:

"RESOLVED, That, in the opinion of this legislature, the second section of the third article of the Constitution of the United States, in these words, to wit,—'The judicial power shall extend to all cases arising under the laws of the United States,'—vests in the federal courts, exclusively, and in the Supreme Court of the United States, ultimately, the authority of deciding on the constitutionality of any act or law of the Congress of the United States."

This legislature, nevertheless, proceeded to express its opinion on the constitutionality of the acts in question, with due apologies for its temerity—a further section of its Resolution reading as follows:

"RESOLVED, That, although, for the above reasons, this legislature in their public capacity, do not feel themselves authorized to consider and decide on the constitutionality of the Sedition and Alien laws, (so called,) yet they are called upon, by the exigency of this occasion, to declare that, in their private opinions, these laws are within the powers delegated to Congress, and promotive of the welfare of the United States."

This, as far as we know, is the first statement by any public body of the doctrine of the exclusiveness of the right of the Judiciary to interpret the Constitution.

The same position was taken by the legislatures of the States of Massachusetts, New Hampshire, and Vermont, and the Senate of the State of New York.

Although there are different shadings of phraseology used in the resolutions passed by these bodies, they all unite in stating that the Federal Judiciary has the exclusive power of passing on the constitutionality of the acts of Congress, and at the same time they all declare that the Alien and Sedition Laws are constitutional.

Most of these resolutions are rather brief. But the legislature of Massachusetts expressed its views in a very long document, in which it argues at length in support of its position. The most salient passages of this document are as follows:

"That this legislature are persuaded that the decision of all cases in law and equity arising under the Constitution of the United States, and the construction of all laws made in pursuance thereof, are exclusively vested by the people in the judicial courts of the United States. . . .

"The legislature of Massachusetts, although they do not themselves claim the right . . . to decide upon the constitutionality of the acts of the federal government, still . . . as the General Assembly of Virginia has called for an expression of their sentiments,—do explicitly declare, that they consider the acts of Congress, commonly called 'the Alien and Sedition Acts,' not only constitutional, but expedient and necessary. . . .

"The genuine liberty of speech and the press is the liberty to utter and publish the truth; but the constitutional right of the citizen to utter and publish the truth is not to be confounded with the licentiousness, in speaking and writing, that is only employed in propagating falsehood and slander. This freedom of the press has been explicitly secured by most, if not all the state constitutions; and of this provision there has been generally but one construction among enlightened men—that it is a security for the rational use, and not the abuse of the press; of which the courts of law, the juries and people will judge: this right is not infringed, but confirmed and established, by the late act of Congress. . . .

"Seditious practices and unlawful combinations against the federal government, or any officer thereof, in the performance of

his duty, as well as licentiousness of speech and of the press, were punishable, on the principles of common law, in the courts of the United States, before the act in question was passed. This act, then, is an amelioration of that law in favor of the party accused, as it mitigates the punishment which that authorizes, and admits of any investigation of public men and measures which is regulated by truth. . . .

"This construction of the Constitution, and of the existing law of the land, as well as the act complained of, the legislature of Massachusetts most deliberately and firmly believe, results from a just and full view of the several parts of the Constitution; and they consider that act to be wise and necessary, as an audacious and unprincipled spirit of falsehood and abuse had been too long unremittingly exerted for the purpose of perverting public opinion, and threatened to undermine and destroy the whole fabric of government."

It will be noted that a belief in the existence of the Judicial Power goes hand in hand with a belief in the existence of a criminal law of the United States without congressional legislation, and in the constitutionality, wisdom, and even beneficence of the Alien and Sedition Laws. The fact is that the three articles of faith were part of the same partisan creed.

It was the purpose of the Madison Report to answer these counterblasts, and it met them squarely. This document, officially approved by the Virginia House of Delegates on January 7th, 1800, by a vote of 100 to 60, and by the Senate on January 18th, 1800, by a vote of 15 to 6, is one of the most remarkable documents of its kind. Notwithstanding the difference of its origin and occasion, it is at least as remarkable as Marshall's opinion in Marbury v. Madison as an exposition of the system of government established by the United States Constitution. It is a more lengthy document than Marshall's famous opinion, and its reasoning is wider in its scope and more controversial in its nature. It is in many respects a more ably written document, however, much as Marshall's opinion may be admired for its cogency of reasoning and lucidity of statement. As we shall see later, notwithstanding Marshall's well-knit argument it is quite easy to prick holes in his theory. On the other hand, Madison's argument is very hard to meet; and if history were merely logical argument the history of the United States would have been quite different as far as the development of its form of government is concerned. Fortunately

or unfortunately, however, history is wont to play havoc with purely logical constructions; and since it was Marshall's theory that prevailed, or is supposed to have prevailed, there are probably ten thousand people who have read or heard of Marshall's opinion to every one that has read or heard of Madison's report.

As was to be expected, the greater part of the Report deals with the relations between the Federal government and the State governments under the Constitution, and with the specific question of the constitutionality of the Alien and Sedition Laws. These matters are, of course, extraneous to our inquiry, and need not be gone into here. There is one point, however, in the argument which must be brought out here, and that is the one referring to the question of the existence of a common law of the United States, on which the entire argument for the constitutionality of the Sedition Act was based. This is interesting not only because it shows a thorough agreement on the point between Madison and Jefferson, but also because it shows that Madison was a much better constitutional lawyer than any of the great legal lights who were members of the Federalist party at the time, including all of the members of the United States Supreme Court, as evidenced by subsequent decisions of the Supreme Court itself. On this point Madison says in his Report:

"The committee refer to the doctrine lately advanced as a sanction to the Sedition act, 'that the common or unwritten law,' a law of vast extent and complexity, and embracing almost every possible subject of legislation, both civil and criminal, makes a part of the law of these States, in their united and national capacity.

"The novelty, and, in the judgment of the committee, the extravagance of this pretension, would have consigned it to the silence, in which they have passed by other arguments, which an extraordinary zeal for the act has drawn into the discussion: but the auspices under which this innovation presents itself, have constrained the committee to bestow on it an attention, which other considerations might have forbidden."

Madison then examines the history of the common law in the various colonies and states out of which the Union had finally been constructed, and then proceeds to consider the consequences which would flow from the adoption of the doctrine that the common law is part of the Federal system of law, showing the absurdities to which such a doctrine would necessarily lead. We cannot

follow this argument in detail, but we must quote two paragraphs of the Report in this connection, as illustrative of Madison's acuteness as a legal reasoner, and as throwing light upon his view of the powers granted by the Constitution to the National Legislature. These paragraphs read as follows:

"If it be understood that the common law is established by the Constitution, it follows that no part of the law can be altered by the Legislature; such of the statutes already passed as may be repugnant thereto, would be nullified; particularly the 'Sedition act' itself, which boasts of being a melioration of the common law; and the whole code, with all its incongruities, barbarisms, and bloody maxims, would be inviolably saddled on the good people of the United States.

"Should this consequence be rejected, and the common law be held, like other laws, liable to revision and alteration, by the authority of Congress, it then follows, that the authority of Congress is co-extensive with the objects of common law; that is to say, with every object of legislation: for to every such object does some branch or other of the common law extend. The authority of Congress would, therefore, be no longer under the limitations marked out in the Constitution. They would be authorized to legislate in all cases whatsoever."

Another interesting part of the Madison Report is that which deals with the specious argument that the Sedition Law was meant to ameliorate the common law, as a sort of protection to the offenders at which it was aimed. Replying to this, Madison said:

"In the attempts to vindicate the 'Sedition act,' it has been contended, 1. That the 'freedom of the press' is to be determined by the meaning of these terms in the common law. . . .

"The freedom of the press, under the common law, is in the defences of the Sedition act, made to consist in an exemption from all previous restraint on printed publications, by persons authorized to inspect and prohibit them. It appears to the committee, that this idea of the freedom of the press, can never be admitted to be the American idea of it: since a law inflicting penalties on printed publications would have a similar effect with a law authorizing a previous restraint on them. It would seem a mockery to say, that no laws should be passed, preventing publications from being made, but that laws might be passed, for punishing them in case they should be made.

"The essential difference between the British government, and the American constitutions will place this subject in the clearest light.

"In the British government, the danger of encroachments on

the rights of the people, is understood to be confined to the executive magistrate. The representatives of the people in the legislature, are not only exempt themselves, from distrust, but are considered as sufficient guardians of the rights of their constituents against the danger from the executive. Hence, it is a principle, that the parliament is unlimited in its power; or, in their own language, is omnipotent. Hence, too, all the ramparts for protecting the rights of the people, such as their Magna Charta, their Bill of Rights, etc. are not reared against the parliament, but against the royal prerogative. They are merely legislative precaution, against executive usurpation. Under such a Government as this, an exemption of the press from previous restraint by licensers appointed by the king, is all the freedom that can be secured to it.

"In the United States, the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. Encroachments are regarded as possible from the one, as well as from the other. Hence, in the United States, the great and essential rights of the people are secured against legislative, as well as against executive ambition. They are secured not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires, that it should be exempt, not only from previous restraint by the executive, as in Great Britain; but from legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licenses, but from the subsequent penalty of laws.

"The state of the press, therefore, under the common law, cannot in this point of view, be the standard of its freedom in the United States."

The most interesting part, however, of the entire Report, from our point of view, is a short passage on the question of the power of the Judiciary which throws a flood of light on Madison's theory of government under the United States Constitution, which was no different now from what it was when he wrote The Federalist. He says:

"It has been said that it belongs to the judiciary of the United States, and not the state legislatures, to declare the meaning of the federal constitution.

"But a declaration, that proceedings of the federal government are not warranted by the constitution, is a novelty neither among the citizens, nor among the legislatures of the states; nor are the citizens or the legislature of Virginia, singular in the example of it. "Nor can the declarations of either, whether affirming or denying the constitutionality of measures of the federal government, or whether made before or after judicial decisions thereon, be deemed, in any point of view, an assumption of the office of the judge. The declaration in such cases, are expressions of opinion, unaccompanied with any other effect than what they may produce on opinion, by exciting reflection. The expositions of the judiciary, on the other hand, are carried into immediate effect by force. The former may lead to a change in the legislative expression of the general will; possibly to a change in the opinion of the judiciary; the latter enforces the general will, whilst that will and that opinion continue unchanged."

It is evident that according to Madison's theory of government as held at the time of the report, while the judiciary was independent, and therefore had a right to declare for itself the meaning of the Constitution, its decision, theoretically, at least, was binding only upon itself. It was binding neither upon the legislature nor upon any one else who was called upon to act independently under the Constitution.

Nor, for that matter, upon the people at large, or any body politic, when called upon to act directly under the Constitution on the subject matter in hand. The Legislature, acting legislatively, had a right to disregard the opinion of the Judiciary and to re-enact laws which the Judiciary had declared unconstitutional. But it had no right to reverse a decision of a court in an actual case.

The Executive, acting in his executive capacity on matters belonging to the executive department, had the same independent right of interpreting the Constitution, and was bound neither by the interpretation of the Legislature nor by that of the Judiciary. Whether or not the mere carrying out of a judgment in a particular case may be considered an executive function is nowhere explicitly stated by Madison. We cannot, therefore, determine whether, under the Madison theory, the sheriff was in the same position as in the Wilsonian theory recently revived by the committee of the New York State Bar Association in Mr. Abbot's Concurring Memorandum.

As to people who are not called upon to act under the Constitution but merely to express their opinion, their right, under this theory, was in no way affected by the determination of the judiciary or any other governmental department. And not only

in the sense that they could not be stopped from expressing idle opinions, but in the sense that their opinion, if well reasoned, carried the weight of its reasoning, and, if the bodies were authoritative, the weight of their authority. In other words, under this theory, there is no body especially appointed by the Constitution to interpret its meaning. There were in fact three departments appointed by the Constitution for that purpose—the three great departments of the government—each department being a law unto itself in this respect. And no decision was considered definite and determinative unless all of the three departments of government united in an opinion and continued to act on that opinion for so long a time that it must be assumed that it had received the sanction of the entire community.

This theory, which may be called the true theory of the Framers of the Constitution, if any theory may be so called, is well illustrated in Madison's own attitude towards the question of the constitutionality of the United States Bank, which we shall have occasion to consider further below, and was reiterated by him in letters written in 1830 and 1831,—showing him not only to have had a carefully worked out and consistent theory of government, but, also, that he held to it tenaciously, in its main outlines at least, throughout his long career as a public man.

CHAPTER IX

SOME MORE PRECEDENTS

E have now reached the threshold of the new century, marking a turning point in the history of this country; the new era being ushered in by the famous decision in Marbury v. Madison. Before proceeding, however, to discuss this momentous decision, we must stop to consider a few more "precedents."

For the searchers for "precedents" are busy not only with those periods of world history, and particularly the history of England and the United States, which preceded the framing of the United States Constitution, in order to discover precedents which the Framers might have followed in putting the Judicial Power into the Constitution, but also with scrutinizing the records of decisions in the United States between the time of the adoption of the Constitution and Marshall's decision, searching for precedents justifying Marshall's act in interpreting the Constitution as containing such a power.

We said at the outset of the last chapter that the first decade under the Constitution (or, to be exact, the first fourteen years) were chiefly remarkable for the absence of decisions in which the Judicial Power was exercised. But that does not deter the precedent-hunters. And in this case the supporters of the Judicial Power received official assistance in their search for precedents in a remarkable document issued under the authority of the United States Supreme Court itself on the occasion of the celebration of the first centenary of its existence. On that occasion the official reporter of the United States Supreme Court prepared an elaborate document, forming quite a sizable little volume in itself, as an appendix to Vol. 131 of the United States Reports, dealing with various phases of the history of that August Tribunal. In his introductory remarks, the official reporter states that he has submitted the document to each of the judges of the Supreme Court, and that it has received their approval, although in their individual

capacity only. Among other things, this document contains a list of cases in which the Supreme Court is supposed to have declared unconstitutional acts or parts of acts of the Congress of the United States during the first hundred years of its existence. Twenty cases are cited; and we shall have further occasion to refer to this rather remarkable list.

Here we shall note only the first two cases, for they are supposed to have occurred during the period here under consideration.

These two cases, which are of course listed by every precedent-seeker in this connection, are, in the order mentioned in this list, Hayburn's Case and United States v. Yale Todd. Professor Haines, whose zeal and success in unearthing "precedents" we have already had occasion to note, has discovered a third, the case known as Vanhorne's Lessee v. Dorrance.

The first of these cases arose out of the following facts: On March 23rd, 1792, Congress passed an act requiring the United States Circuit Courts to examine and report on the claims of disabled soldiers and sailors and to certify their opinions to the Secretary of War, who should thereupon place the persons so certified and reported on the pension list. Under the provisions of this act, the claims so certified were to be passed upon finally by the Secretary of War; and it is claimed that because of that provision the judges of the United States Supreme Court declared this act unconstitutional in the above mentioned case, as imposing upon the courts non-judicial duties. As we have seen, this case is given on the official list as the first case wherein an act of Congress was declared unconstitutional by the United States Supreme Court. As a matter of fact no such decision was ever rendered by the United States Supreme Court.

Brinton Coxe, in speaking of this case in connection with this official list, says: "As it was never decided, it is not properly entitled to a regular place and number in the list of cases." This is putting the matter very mildly. As a matter of fact, not only was this case never decided, but it was not even a case in the ordinary sense of the word. What actually happened was this: After the act of Congress was passed, some doubts had arisen as to whether Congress had the right to make the judges act as pension commissioners; at least, the judges thought this should not have been done, and some of them refused to act under it. In order to bring this matter to a head, Attorney-General Randolph moved in the

Supreme Court for a mandamus directed to the United States Circuit Court for the District of Pennsylvania, commanding that court to proceed in the petition of William Hayburn, who had applied to be put on the pension list as an invalid pensioner. The Attorney-General stated that his action was ex-officio, without an application from any particular person; and on the court expressing some doubt upon his right to proceed ex-officio, he changed the ground of his interposition, claiming to act on behalf of Hayburn, a party interested. The court then said that they would hold the motion under advisement until the next term, but no decision was ever pronounced, Congress having in the meantime changed the mode of procedure in pension cases.

But while there was no decision, the discussion which arose because of this Act of Congress and the action of the judges are extremely illuminating. In fact, the action is so remarkable, viewed in the light of the Judicial Power as we know it, that the incident deserves to be put on exhibition like the remains of some extinct species, from which students may reconstruct the life of a bygone age. We therefore reproduce at the end of this chapter the official report of the acts of the judges of the United States Supreme Court while sitting as Circuit Judges, as given in a footnote to the official report of Hayburn's Case.

Of course, the case would not have been much of a precedent, even if the Supreme Court had actually ruled that the mandamus could not issue for the reason that Congress had no right to impose upon the judges non-judicial duties. One may very well admit that Congress has no right to impose upon the courts nonjudicial duties, and that when it attempts to do so the courts have a right to refuse to act, without at all admitting the power of the judiciary to declare a general law unconstitutional. But, on the other hand, the fact that some of the judges, including the Chief Justice, actually assumed to carry out this act even though it prescribed non-judicial duties, and the language of the "remonstrance" to the President by those who did not want to act, proclaim loudly the difference between the views then held on the subject of the Judicial Power and those that now prevail on the subject. Neither the timid submission of some, nor the suppliant "remonstrance" of the others, are conceivable under the Judicial Power as we know it—when to declare legislative acts unconstitutional has become almost a matter of daily court routine.

The case listed second on the official list is not much more of a precedent than the first one. It is not quite as illuminating as the first, as it does not help us to resuscitate the politico-constitutional conditions of a bygone age; but that is only because it seems to be altogether apocryphal, having left no record of its existence, or at least such a dubious one that it is hard to tell what it was, if it ever was.

There is no contemporaneous record of the case in the official reports. But in a case decided in 1844, entitled United States v. Ferreira, there is a note written by Chief Justice Taney stating that there had been such a case, and that in it the Supreme Court had declared unconstitutional the Act of Congress already referred to in Hayburn's Case. The indefatigable Brinton Coxe devotes several pages of his learned book to the question whether or not the case of Yale Todd ever existed; and comes to the conclusion that its existence is very doubtful. We shall not tire our readers by going over the ground so ably covered by Mr. Coxe. We shall merely say that its existence is more than doubtful; and will add further that even if it existed it would not mean very much. A case which the Supreme Court reporter did not consider important enough to report, at a time when every motion made in the United States Supreme Court was carefully noted (if for no other reason than to prove that the court was doing something), could not possibly have been very important. Nor do we know of any notice of the case in contemporaneous literature. All of which is in striking contrast to the fuss made over Hayburn's Case. We are, therefore, forced to conclude that if the case ever actually existed it could have involved no such momentous question as challenging the constitutionality of an Act of Congress. To assert that it actually declared an Act of Congress unconstitutional is simply absurd.

Such are the two "precedents" given on the official list. Now as to Professor Haines' "precedent."

Vanhorne's Lessee v. Dorrance has the advantage of having been an actual and rather important case; although its importance was not in connection with our subject. It was decided in the Circuit Court of the United States for the District of Pennsylvania, presided over by Judge Paterson, an Associate Justice of the United States Supreme Court. It grew out of a dispute between the State of Pennsylvania and the State of Connecticut

over a certain tract of land in what is now Luzerne County, Pennsylvania—each claiming the tract, and each attempting to dispose of it to different persons. The immediate occasion of the suit was an attempt by the Legislature of Pennsylvania to settle the dispute by allowing the claims of the so-called Connecticut claimants and reimbursing the Pennsylvania claimants out of certain other lands then owned by the State of Pennsylvania, and a subsequent change of heart by that Legislature on the subject. This attempt to deal with the matter brought forth three separate acts of the Pennsylvania Legislature as follows:

1. The original act of settlement, usually referred to as the "Confirmation Act," passed March 28th, 1787;

2. An Act passed March 29th, 1788, suspending the Confirmation Act; and

3. An Act passed April 1st, 1790, repealing the Confirmation Act.

The plaintiff in the case claimed under the Pennsylvania grant, and the defendant claimed under a Connecticut grant, relying upon the Confirmation Act as the basis of his title. The "precedent" is supposed to consist in the fact that Judge Paterson declared the Confirmation Act invalid, and therefore gave judgment for the plaintiff.

But what actually happened was this: The case was tried before a jury, and the plaintiff showed in support of his title not only that the Confirmation Act, under which the defendant claimed, was first suspended and then repealed, but also that the Act prescribed certain things to be done by the Connecticut claimants in order to come within its provisions, and that the defendant failed to comply with those provisions. It was therefore clear that the plaintiff was entitled to a verdict, quite irrespective of the validity of the Confirmation Act; and Judge Paterson so instructed the jury. But the case was an important one, the trial actually lasting fifteen days, and Mr. Justice Paterson, as was the custom in those days, took advantage of the occasion to discourse before the jury on a number of things, including his views of the Social Compact, the nature of free government, of constitutions in the United States, and of the powers of legislatures under them. In the course of his long discourse he told the jury that in his opinion the Confirmation Act was unconstitutional, but he also

told them that they were the judges of the law as well as of the facts—a rather curious procedure viewed from the modern point of view. Nowadays, if a man claimed a piece of property under an unconstitutional act, the case could not be left for any jury's decision. If it were a jury case the judge would direct the verdict.

It should be noted here that the law, as laid down by Judge Paterson in his charge to the jury, is open to some very serious criticisms, when viewed in the light of subsequent decisions of the United States Supreme Court and of what is considered good constitutional law today.

But we are only concerned with the case as a "precedent," and as such its value is nil. The case was finally left to the jury, and in his discourse on the constitutionality of the Confirmation Act Judge Paterson was merely acting as adviser to the jury, and he was evidently laying down not a theory of Judicial Power, but his Wilsonian theory that the constitutionality of a legislative act is a matter which everyone called upon to act must decide for himself. Judges had no more right to decide the question of constitutionality authoritatively, that is for others, than did the executive or any other governmental functionary. Judge Paterson was giving the jury the benefit of his expert opinion, but the responsibility was theirs. This is clearly quite a different theory of government under a constitution from that which underlies the Judicial Power as we know it. While Vanhorne v. Dorrance may, therefore, be regarded as a precedent against the omnipotence of the Legislature, it is certainly not a precedent for the Judicial Power. If anything, it is a precedent against it, for under this theory the courts have no more power than anybody else to disregard laws for unconstitutionality, and no one has a right to "declare" them so in our sense.

But while there were no decisions on the subject of the Judicial Power during this period, and therefore no precedents, there was occasional discussion on the subject in the courts, on the Bench as well as at the Bar, particularly during the latter part of the 1790's. Judge Paterson's charge to the jury was one of these discussions. During the following year the question was raised in what might be called the modern manner, in the United States Supreme Court itself, in the case of Hylton v. United States. (3 Dall., 171)

On June 5th, 1794, Congress passed an act laying a tax on private carriages. This law was objected to upon the same grounds that were raised against the Income Tax Law a century later —that it was a direct tax, which could be laid only by the so-called rule of "apportionment." The claim of its opponents did not go to the extent of asserting that Congress had no power at all to pass such a law, but only that the rule of "apportionment" instead of the rule of "uniformity" should have been applied; and the counsel who opposed the law devised some very ingenious methods for applying the latter rule. Evidently we had not yet progressed to the point where it could be claimed, even by counsel, that the powers of Congress were limited with respect to any class of taxation. In the course of the discussion, it was assumed by the court and counsel on both sides that the inapplicability of the "apportionment" rule was in itself a proof that the uniformity rule was proper; while in the Income Tax Case, a century later, that argument was brushed aside and the court held that the fact that the "apportionment" rule was inapplicable was decisive of the fact that Congress had no power to lay the tax at all.

The interest of this case in connection with our subject lies in the following declaration, with which Associate Justice Chase concluded his opinion holding the carriage tax constitutional:

"As I do not think the tax on carriages is a direct tax, it is unnecessary at this time, for me to determine whether this court constitutionally possesses the power to declare an act of Congress void on the ground of its being made contrary to and in violation of the constitution, but, if the court have such power, I am free to declare that I will never exercise it, but in a very clear case."

Another occasion for the discussion of our subject arose in another case decided at the same term of the Supreme Court with the Hylton Case. That was the case of Ware v. Hylton (3 Dall., 199) This time the principal discussion came from the Bar, but from no less a person than John Marshall himself. It was Marshall's first and only appearance at the Bar of the United States Supreme Court. And his argument in his only appearance before the court in which he was to make so much history is of the greatest interest, particularly in view of that subsequent history. For in this argument he took a position exactly contrary

to that which he subsequently took in Marbury v. Madison. In the course of his argument in the Ware Case Marshall said:

"The legislative authority of any country can only be restrained by its own municipal constitution: This is a principle that springs from the very nature of society; and the judicial authority can have no right to question the validity of a law, unless such a jurisdiction is expressly given by the constitution. It is not necessary to enquire, how the judicial authority should act, if the Legislature were evidently to violate any of the laws of God; but property is the creature of civil society, and subject, in all respects, to the disposition and controul of civil institutions."

In addition to his view as given being directly contrary to his views in *Marbury v. Madison*, Marshall here emphatically repudiated in advance many of the decisions about property since made by our courts under the Fourteenth Amendment.

But our interest in this case is not confined wholly to the discussion at the Bar. Mr. Justice Chase also contributed to the interest of the case. For in the course of his opinion he said:

"It is admitted, that Virginia could not confiscate private debts without a violation of the modern law of nations, yet if in fact, she has so done, the law is obligatory on all the citizens of Virginia, and on her Courts of Justice; and, in my opinion, on all the Courts of the United States. If Virginia by such conduct violated the law of nations, she was answerable to Great Britain, and such injury could only be redressed in the treaty of peace. Before the establishment of the national government, British debts could only be sued for in the state courts. This, alone, proves that the several states possessed a power over debts. If the crown of Great Britain had, according to the mode of proceeding in that country, confiscated, or forfeited American debts, would it have been permitted in any of the courts of Westminster Hall, to have denied the right of the crown, and that its power was restrained by the modern

Marshall seems to be in the same boat with Hamilton. For he, too, evidently made more than one change—if the opinion of our judicial historians be taken as correct. For, according to the latter, Marshall is supposed to have expressed himself in favor of judicial review at the Virginia Ratifying Convention. If that be so, he changed his views twice. We will probably be nearly right, however, if we don't ascribe to his remarks in the Virginia Convention the meaning or importance usually ascribed to them. But Marshall's views on the nature of property as stated in his argument in Ware v. Hylton are, however, important. They furnish as good an answer as can be found to the great question propounded by the Special Committee of the New York State Bar Association. We have already given Madison's answer. We now have Marshall's answer: "Property—says he—is the creature of civil society, and subject, in all respects, to the disposition and controul of civil institutions"—that is to say, to the rule of the majority, in a democratic government.

law of nations? Would it not have been answered, that the British nation was to justify her own conduct; but that her courts were

to obey her laws? . . .

"The argument, that Congress had not power to make the 4th article of the treaty of peace, if its intent and operation was to annul the laws of any of the States, and to destroy vested rights (which the Plaintiff's Counsel contended to be the object and effect of the 4th article) was unnecessary, but on the supposition that this court possess a power to decide, whether this article of the treaty is within the authority delegated to that body, by the articles of confederation. Whether this court constitutionally possess such a power is not necessary now to determine, because I am fully satisfied that Congress were invested with the authority to make the stipulation in the 4th article. If the court possess a power to make treaties void, I shall never exercise it, but in a very clear case indeed." (Ware v. Hylton, 3 Dall., 199)

At the August, 1798, term, the Supreme Court decided another very interesting and much quoted case—Calder v. Bull (3 Dall., 386) already referred to. This case is now important chiefly for the fact that it has established the important principle, already mentioned, that the Federal courts have no power to declare a state law unconstitutional for alleged repugnancy to the state constitution. It is further interesting because the opinions of the judges of the court, which were, under the custom of that day, delivered seriatim, each judge delivering a separate opinion, developed into a debate between Judge Chase and Judge Iredell on the subject of Judicial Power. In the course of this debate one of the judges advanced a theory somewhat akin to the famous Coke theory, only to be controverted by another judge—a rather odd thing if the American Revolution had been made in order to put Mr. Coke into our constitutional system. But even more significant is the fact that this debate clearly shows that the so-called Coke doctrine was then conceived to be, as it undoubtedly is, the antithesis of what might be called the American Doctrine of the Judicial Power.

It seems that Mr. Justice Chase's iterations of his doubts as to the power of the Judiciary to declare a law unconstitutional got on Mr. Justice Iredell's nerves, for, as we have already seen, Mr. Justice Iredell had no doubts on the subject. So when Mr. Justice Chase took occasion in this case for a third time to announce his doubts, Mr. Justice Iredell's patience gave out, and he deemed it time to reply, although both judges agreed that the discussion was not necessary to the decision of the case. Incidentally, Mr. Justice Iredell took occasion to repudiate Judge Chase's own constitutional theory, which seemed to favor the Coke theory, if the Judicial Power were to be recognized at all.

The discussion between the two judges may be summarized thus: Mr. Justice Iredell believed that in the absence of constitutional restrictions, the Legislature was omnipotent. The courts were therefore bound to enforce any law of the Legislature which was not in contravention of some provision of a written constitution. They could not, therefore, refuse to enforce a law because it was repugnant to some higher law not contained in the Constitution itself, such as "natural law," "social compact," etc. On the other hand, Mr. Justice Chase doubted the right of the Judiciary to declare a law of the Legislature void for repugnancy to the Constitution under which both departments were acting, but he thought that the courts had a right to refuse to enforce a law which was "contrary to the first great principles of the social compact."

APPENDIX

I. HAYBURN'S CASE

The following is appended by way of a footnote to the official report of Hay-burn's Case (2 Dall., 409).

"As the reasons assigned by the Judges, for declining to execute the first act of Congress, involve a great Constitutional question, it will not be thought improper to subjoin them, in illustration of Hayburn's case.

"The Circuit court for the district of New York (consisting of Jay, Chief Justice, Cushing, Justice, and Duane, District Judge) proceeded on the 5th of April, 1791, to take into consideration the act of Congress entitled 'An act to provide for the settlement of the claims of widows and orphans barred by the limitations heretofore established, and to regulate the claims to invalid pensions'; and were, thereupon, unanimously of opinion and agreed,

"That by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.

"That neither the Legislative nor the Executive branches, can constitutionally assign to the Judicial any duties, but such as are properly judicial, and to be performed in a judicial manner.

"That the duties assigned to the Circuit courts, by this act, are not of that description, and that the act itself does not appear to contemplate them as such; in as much as it subjects the decisions of these courts, made pursuant to those duties,

first to the consideration and suspension of the Secretary at War, and then to the revision of the Legislature; whereas by the Constitution, neither the Secretary at War, nor any other Executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.

"'As, therefore, the business assigned to this court, by the act, is not judicial, nor directed to be performed judicially, the act can only be considered as appointing commissioners for the purposes mentioned in it, by official instead of personal de-

scriptions.

"'That the Judges of this court regard themselves as being the commissioners designated by the act, and therefore as being at liberty to accept or decline that

office.

"That as the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress; and as the Judges desire to manifest, on all proper occasions, and in every proper manner, their high respect for the National Legislature, they will execute this act in the capacity of commissioners.

"'That as the Legislature have a right to extend the session of this court for any term, which they may think proper by law to assign, the term of five days, as

directed by this act, ought to be punctually observed.

"That the Judges of this court will, as usual, during the session thereof, adjourn the court from day to day, or other short periods, as circumstances may render proper, and that they will, regularly, between the adjournments, proceed as commissioners to execute the business of this act in the same court room, or chamber."

"The Circuit Court for the district of Pennsylvania, (consisting of Wilson, and Blair, Justices, and Peters, District Judge) made the following representation, in a letter jointly addressed to the President of the United States, on the 18th of April, 1792.

"To you it officially belongs to "take care that the laws" of the United States "be faithfully executed." Before you, therefore, we think it our duty to lay the sentiments, which, on a late painful occasion, governed us with regard to an act passed by the legislature of the union.

"'The people of the United States have vested in Congress all legislative

powers "granted in the constitution."

"'They have vested in one Supreme Court, and in such inferior courts as the

Congress shall establish, "the judicial power of the United States."

"'It is worthy of remark, that in Congress the whole legislative power of the United States is not vested. An important part of that power was exercised by the people themselves, when they "ordained and established the Constitution."

"'This Constitution is "the Supreme Law of the Land." This supreme law "all judicial officers of the United States are bound, by oath or affirmation, to support."

"It is a principle important to freedom, that in government, the judicial should be distinct from, and independent of, the legislative department. To this important principle the people of the United States, in forming their Constitution, have manifested the highest regard.

"'They have placed their judicial power not in Congress, but in "courts." They have ordained that the "Judges of those courts shall hold their offices during good behaviour," and that "during their continuance in office, their salaries shall not

be diminished."

"'Congress have lately passed an act, to regulate, among other things, "the claims to invalid pensions."

"'Upon due consideration, we have been unanimously of opinion, that under this act, the Circuit court held for the Pennsylvania district could not proceed;

"1st. Because the business directed by this act is not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States; the Circuit court must, consequently, have proceeded without constitutional authority.

"2nd. Because, if, upon that business, the court had proceeded, its judgments (for its opinions are its judgments) might, under the same act, have been revised and controuled by the legislature, and by an officer in the executive department. Such revision and controul we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and, consequently, with that important principle which is so strictly observed by the Constitution of the United States.

"These, Sir, are the reasons of our conduct. Be assured that, though it became necessary, it was far from being pleasant. To be obliged to act contrary, either to the obvious directions of Congress, or to a constitutional principle, in our judgment equally obvious, excited feelings in us, which we hope never to experience

"The Circuit Court for the district of North Carolina, (consisting of Iredell, Justice, and Sitgreaves, District Judge) made the following representation in a letter jointly addressed to the President of the United States, on the 8th of June,

"'We, the judges now attending at the Circuit court of the United States for the district of North Carolina, conceive it our duty to lay before you some important observations which have occurred to us in the consideration of an act of Congress lately passed, entitled "an act to provide for the settlement of the claims of widows and orphans barred by the limitations heretofore established, and to regu-

late the claims to invalid pensions.

"'We beg leave to premise, that it is as much our inclination, as it is our duty, to receive with all possible respect every act of the Legislature, and that we never can find ourselves in a more painful situation than to be obliged to object to the execution of any, more especially to the execution of one founded on the purest principles of humanity and justice, which the act in question undoubtedly is. But, however lamentable a difference in opinion really may be, or with whatever difficulty we may have formed an opinion, we are under the indispensable necessity of acting according to the best dictates of our own judgment, after duly weighing every consideration that can occur to us; which we have done on the present occasion.

"'The extreme importance of the case, and our desire of being explicit beyond the danger of being misunderstood, will, we hope, justify us in stating our observations in a systematic manner. We therefore, Sir, submit to you the following:-

"'1. That the Legislative, Executive, and Judicial departments, are each formed in a separate and independent manner; and that the ultimate basis of each is the Constitution only, within the limits of which each department can alone justify any act of authority.

"'2. That the Legislature, among other important powers, unquestionably possess that of establishing courts in such a manner as to their wisdom shall appear best, limited by the terms of the constitution only; and to whatever extent that power may be exercised, or however severe the duty they may think proper to require, the Judges, when appointed in virtue of any such establishment, owe implicit and unreserved obedience to it.

"'3. That at the same time such courts cannot be warranted, as we conceive, by virtue of that part of the Constitution delegating Judicial Power, for the exercise of which any act of the legislature is provided, in exercising (even under the authority of another act) any power not in its nature judicial, or, if judicial, not provided for

upon the terms the Constitution requires.

"'4. That whatever doubt may be suggested, whether the power in question is properly of a judicial nature, yet inasmuch as the decision of the court is not made final, but may be at least suspended in its operation by the Secretary at War, if he shall have cause to suspect imposition or mistake; this subjects the decision of the court to a mode of revision which we consider to be unwarranted by the Constitution; for, though Congress may certainly establish, in instances not yet provided for, courts of appellate jurisdiction, yet such courts must consist of judges appointed in the manner the Constitution requires, and holding their offices by no other tenure than that of their good behaviour, by which tenure, the office of Secretary at War is not held. And we beg leave to add, with all due deserence, that no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the Constitution, be liable to a reversion, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments.

"'These, sir, are our reasons for being of opinion, as we are at present, that this Circuit court cannot be justified in the execution of that part of the act, which requires it to examine and report an opinion on the unfortunate cases of officers and soldiers disabled in the service of the United States. The part of the act requiring the court to sit five days, for the purpose of receiving applications from such persons, we shall deem it our duty to comply with; for, whether in our opinion such purpose can or cannot be answered, it is, as we conceive, our indispensable duty to

keep open any court of which we have the honor to be judges, as long as Congress shall direct.

"'The high respect we entertain for the Legislature, our feelings as men for persons, whose situation requires the earliest, as well as the most effectual relief, and our sincere desire to promote, whether officially or otherwise, the just and benevolent views of Congress, so conspicuous on the present as well as on many other occasions, have induced us to reflect, whether we could be justified in acting, under this act, personally in the character of commissioners during the session of a court; and could we be satisfied that we had authority to do so, we would cheerfully devote such part of our time as might be necessary for the performance of the service. But we confess we have great doubts on this head. The power appears to be given to the court only, and not to the Judges of it; and as the Secretary at War has not a discretion in all instances, but only in those where he has cause to suspect imposition or mistake, to with-hold a person recommended by the court from being named on the pension list, it would be necessary for us to be well persuaded we possessed such an authority, before we exercised a power, which might be a means of drawing money out of the public treasury as effectually as an express appropriation by law. We do not mean, however, to preclude ourselves from a very deliberate consideration, whether we can be warranted in executing the purposes of the act in

that manner, in case an application should be made.

"'No application has yet been made to the court, or to ourselves individually, and therefore we have had some doubts as to the propriety of giving an opinion in a case which has not yet come regularly and judicially before us. None can be more sensible than we are of the necessity of judges being in general extremely cautious in not intimating an opinion in any case extra-judicially, because we well know how liable the best minds are, notwithstanding their utmost care, to a bias, which may arise from a pre-conceived opinion, even unguardedly, much more deliberately, given: But in the present instance, as many unfortunate and meritorious individuals, whom Congress have justly thought proper objects of immediate relief, may suffer great distress even by a short delay, and may be utterly ruined by a long one, we determined at all events to make our sentiments known as early as possible, considering this as a case which must be deemed an exception to the general rule, upon every principle of humanity and justice; resolving however, that so far as we are concerned individually, in case an application should be made, we will most attentively hear it; and if we can be convinced that this opinion is a wrong one, we shall not hesitate to act accordingly, being as far from the weakness of supposing that there is any reproach in having committed an error, to which the greatest and best men are sometimes liable, as we should be from so low a sense of duty, as to think it would not be the highest and most deserved reproach that could be bestowed on any men (much more on Judges) that they were capable, from any motive, of persevering against conviction, in apparently maintaining an opinion, which they really thought to be erroneous."

II. CALDER V. BULL, (3 DALL., 386)

Mr. Justice Chase, expressing what might be called the Coke theory of the Judicial Power, said:

"I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without controul; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free Republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the

Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B. It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The Legislature may enjoin, permit, forbid, and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments."

After having thus laid down the theory of Judicial Power according to Coke, he thus expressed his doubts with reference to the American theory:—

"Without giving an opinion, at this time, whether this Court has jurisdiction to decide that any law made by Congress, contrary to the Constitution of the United States, is void; I am fully satisfied that this court has no jurisdiction to determine that any law of any state Legislature, contrary to the Constitution of such state, is void."

To this, Mr. Justice Iredell replied as follows:-

"If, then, a government, composed of Legislative, Executive and Judicial Departments, were established, by a Constitution, which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void. It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any court of Justice would possess a power to declare it so. Sir William Blackstone, having put the strong case of an act of Parliament, which should authorize a man to try his own cause, explicitly adds, that even in that case, "there is no court that has power to defeat the intent of the Legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the Legislature, or no."

In order, therefore, to guard against so great an evil, it has been the policy of all the American states, which have, individually, framed their state constitutions since the revolution, and of the people of the United States, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. There are then but two lights, in which the subject can be viewed: 1st. If the Legislature pursue the authority delegated to them, their acts are valid. 2nd. If they transgress the boundaries of that authority, their acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust; but in the latter case, they violate a fundamental law, which must be our guide, whenever we are called upon as judges to determine the validity of a legislative act."

CHAPTER X

JOHN MARSHALL AND MARBURY V. MADISON

HE debate between the judges of the Supreme Court in Calder v. Bull occurred in August, 1798, shortly after the passage of the Alien and Sedition Laws, and a few months before the passage of the Virginia and Kentucky Resolutions. The famous Madison Report was made a year later; and after the lapse of another year occurred the "Revolution of 1800," which swept the Federalists out of power and the Federalist party out of existence. That "Revolution" put Congress and the presidency into the hands of the Republican party, but not the Judiciary. The Federal judges consisted almost exclusively of Federalists, and the last few months of the Adams Administration were spent reorganizing the Federal Judiciary in such a manner as to entrench the Federalist party in that department for as long a time as possible—possibly for a generation to come. Part of this policy was the appointment of John Marshall as the Chief Justice of the United States; and another part was the passage of the law which gave rise to the most famous case decided by John Marshall.

We have already noted the fact that two years earlier President Adams wanted to appoint John Marshall an Associate Justice of the Supreme Court. At that time Marshall declined the offer, as in the pre-Marbury days the office of an Associate Justice of the Supreme Court was not considered important enough for an important politician, and Marshall had recently become an important politician owing to the X.Y.Z. Mission already referred to. So he declined the offer, with the result that Bushrod Washington, George Washington's nephew, was appointed to the place. Later on, Marshall was made, successively, Attorney-General and Secretary of State, and held each of these positions for a short time. But with the Revolution of 1800 matters changed considerably: The Federalist party was going out of office, and the only offices left in its gift were the judicial offices; and the President and his

advisers were looking around for strong men to put into these positions, so as to keep the judiciary "steady" in the stormy days to come. So when Marshall was now offered the Chief Justiceship he "gratefully" accepted.

We have already noted Mr. Warren's remarks in connection with Marshall's consideration for the office of Associate Justice of the United States Supreme Court, to the effect that Marshall was not an "eminent" lawyer. He was even less eminent as a jurist. In fact, his legal education before he was admitted to the bar was of the scantiest imaginable; and there is no proof of his ever having improved very much on his original education by subsequent study. But he was undoubtedly a man of great abilities. He had attained some standing at the Virginia Bar, particularly as a jury lawyer, and had certainly attained high standing as a politician since he came into prominence in connection with the X.Y.Z. Mission. He was not John Adams' first choice, however. When the position became vacant by the resignation of Chief Justice Ellsworth, President Adams reappointed John Jay, who had been the first Chief Justice, and who had recently resigned from the office of Governor of the State of New York. But John Jay refused the appointment, although the Senate had confirmed his nomination and the commission had actually been issued to him. His letter declining the appointment is very interesting, as showing the difference in the position held then and now by the United States Supreme Court in the governmental machinery of this country:

"I left the Bench—said Jay in his letter—perfectly convinced that under a system so defective, it would not obtain the energy, weight and dignity which are essential to its affording due support to the National Government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence, I am induced to doubt both the propriety and the expediency of returning to the Bench, under the present system."

After Jay had declined, Adams turned to John Marshall, who was then his Secretary of State. But the appointment was by no means a popular one even among the Federalists, many of whom thought that after Jay declined the office one of the Associate Justices should have been appointed, Judge Paterson being the favorite. There was even some talk of the Senate refusing to con-

firm the nomination; and the confirmation did not actually come until after some delay. One of the Federalist Senators, Dayton of New Jersey, referred to the appointment as a "wild freak" of President Adams. But Adams was obdurate, and so the Senate finally confirmed the nomination, and Marshall took office on February 4th, 1801, just one month before Jefferson took office as President of the United States. Of how little importance John Marshall, as well as the office of Chief Justice, were then regarded, is evidenced by the fact that Marshall's appointment to the office provoked no discussion of any kind in the public press, and that his assumption of office was not even noticed in the newspapers.

On the other hand, the case on which some would rest Marshall's chief claim to fame attracted attention from the moment it came into court—it being part of the great political controversy then raging over the attempt of the Federalists to use the Federal Judiciary for partisan purposes, and to entrench themselves in that department after they had been overwhelmingly defeated in the recent elections.

One of the last acts of the Adams Administration was the reorganization of the Federal Judiciary. This took the form of two bills: the principal bill being known as the Circuit Court Bill; and the other one, of less importance, dealing with the organization of the judiciary in the District of Columbia. The Circuit Court Bill became a law on February 13th, 1801, and the District of Columbia Bill on February 27th, 1801. These Bills provided for numerous new judges, who were appointed in the closing days of the Adams Administration, some of them, it is said, shortly before midnight of March 3rd, when Mr. Adams retired from office. These judges therefore became known as the "midnight judges."

The Circuit Court Bill was supposed to have been a piece of remedial legislation, intended to remove serious defects in the working machinery of the courts, particularly the abolition of the Circuit Court duties of judges of the Supreme Court, of which these judges had repeatedly complained. But the actual Bill and the circumstances under which it was enacted were such that it was considered a piece of political jobbery on the part of the Federalist party, designed in part for the purpose of providing jobs for its adherents, and even more for the purpose of perpetuating its objectionable conceptions of the Constitution and of the functions of the judiciary thereunder, despite the fact that the

party had been turned out of office largely because of these objectionable features of its political creed.

How bitter was the feeling of the Anti-Federalists over this action of the expiring Federalist administration can be seen from the following incidents. Senator Jackson of Georgia, in the course of a debate in the United States Senate, said:

"We have been asked if we are afraid of having an army of Judges. For myself, I am more afraid of an army of Judges under the patronage of the President than of an army of soldiers. The former can do us more harm. They may deprive us of our liberties, if attached to the Executive, from their decisions, and from the tenure of office contended for we cannot remove them."

While the bill was pending before Congress, the Aurora, leading Anti-Federalist organ, wrote:

"One of the most expensive and extravagant, the most insidious and unnecessary schemes that has been conceived by the Federal party is now before Congress under the name of the Judiciary Bill, but which might with greater propriety be called a bill for providing sinecure places and pensions for thorough-going Federal partisans."

Another prominent Anti-Federalist wrote: "A new Judiciary system has been adopted with a view to make permanent provision for such of the Federalists and Tories as cannot hope to continue in office under the new Administration. Among these, John Marshall and Charles Lee are provided for; Marshall's brother-in-law is also nominated, and I expect some of his Kentucky connections will be remembered when the nominations are made."

Another Anti-Federalist wrote of the Judiciary law: "It is a law which may be considered as the last effort of the most wicked, insidious and turbulent faction that ever disgraced our political annals, the ne plus ultra of an expiring faction to enthral the measures likely to be pursued by the new Administration, and to serve as one of the principal, cogs in the wheel of consolidation."

Sometimes the partisan character of this legislation was openly stated by the Federalists themselves.

"It is necessary—wrote a Federalist newspaper—to strengthen the Government in the affections of the people by multiplying Federal Courts; the State Courts are more or less infected with Anti-Federalism; in the extension of the Federal Courts lies the safety of the Federal Government." (Quoted in Warren, Supreme Court, I, pp. 187-192)

This view of the reorganization of the Judiciary as a purely partisan affair, designed to provide offices for Federalist politicians, and to perpetuate, if possible, Federalist opinions and principles in the government, contrary to the wishes of the people, was shared by the President-elect, Jefferson, who determined to frustrate these attempts so far as lay in his power.

It so happened that the commissions of the new Justices of the Peace created by the District of Columbia Judiciary Bill had not been delivered, and were still lying in the office of the Secretary of State. President Jefferson therefore gave orders that these commissions should not be delivered. The appointments to these offices had been made by President Adams on March 2nd, 1801, and confirmed by the Senate on the following day; and the commissions had been actually made out, signed by President Adams, and sealed by John Marshall himself as Secretary of State. It was now claimed by the appointees to these offices that although the commissions had not been delivered, their appointment was complete, and they were the legal occupants of these offices. In order to test their right to the offices, they instituted a proceeding in the nature of an original suit in the United States Supreme Court for a mandamus directed to James Madison, Jefferson's Secretary of State, to compel him to deliver to them the commissions as the insignia of their offices. There were four of these gentlemen who joined as plaintiffs in this suit: William Marbury, Dennis Ramsay, Robert T. Hope, and William Harper; but Mr. Marbury had the good fortune to have his name appear first in the list, so that it has now become immortalized in the history of this country.

The motion on behalf of Messrs. Marbury et al. was presented to the Supreme Court on December 21st, 1801, by Charles Lee, formerly Attorney-General in President Adams' cabinet; and it immediately attracted the attention of the country, or at least of the capital. The Washington correspondent of the Aurora thus described the event:

"Mr. Lee entered very largely into a definition of the powers of the Court, and of the nature of mandamus which he described as a species of appeal to a superior for redress of wrong done by

an inferior authority. The Chief Justice (J. Marshall, the cidevant XYZ ambassador) asked if the Attorney-General was in Court, and had anything to offer. Mr. Lincoln (Attorney-General) replied that he had no instructions on the subject. The Secretary of State had received notice on the preceding day, but he could not in the interval have turned his attention effectually to the subject. He would leave the proceedings under the discretion of the Court. The Chief Justice, after consultation, found none of the Bench ready but Judge Chase (the same who presided and decided in Mr. Cooper's case) who said if the attorney (Mr. Lee) would explain the extent of his evidence and lay it before the Court in form, he would give his opinion instantly. Some conversation took place on the etiquette of sealing and recording commissions, and Mr. Lee said the law spoke big words and that the act of recording, under his experience of the Secretary's office, was esteemed done when a copy was delivered for entry, and that the copy remained sometimes six weeks unentered, but was still considered as recorded. The Court did not give any opinion, but Mr. Lee proposed to amend his affidavits by a statement that the great seal had been actually affixed to the commissions. The tories talk of dragging the President before the Court and impeaching him and a wonderful deal of similar nothingness. But it is easy to perceive that it is all fume which can excite no more than a judicious irritation." (Quoted in Warren, Supreme Court, I, pp. 202-3)

After some consideration the Court granted the preliminary motion for a rule to show cause, and assigned the fourth day of the next term of the court for the argument of the question whether the petitioners were entitled to the relief prayed for. This action of the court in issuing an order directed to a member of the President's cabinet requiring him to show cause why he should not be ordered by the court to do a certain act in the course of the discharge of his duties was considered a direct attack upon the Executive; not only by the newspapers, but by people in very responsible positions in the new administration and by the leaders of the Republican party generally. A Republican Congressman wrote to James Monroe, the future Secretary of State and President of the United States, regarding this action of the Supreme Court:

"The Court engaged in a curious discussion which has terminated in a decision which is considered as a bold stroke against the Executive authority of the Government. It is supposed that no further proceedings will be had; but that the intention of the gentlemen is to stigmatize the Executive, and give the opposition

matter for abuse and vilification. The consequences of invading the Executive in this manner are deemed here a high-handed exertion of Judiciary power. They may think that this will exalt the Judiciary character, but I believe they are mistaken." (Quoted in Warren, Supreme Court, I, p. 203)

Owing to a law passed by the new Republican Congress, as part of a campaign to undo the work of the reorganization of the Judiciary Department by the last Federalist Congress, there was no session of the Supreme Court after the December, 1801, term until February, 1803.

During the interim, owing to the agitation about the Repeal Law, whereby the new Republican Congress undid the work of the last Federalist Congress in reorganizing the Federal judiciary, the Marbury case had been forgotten. With the approach of the new term it came again to the fore, however. When the original application to the Supreme Court had been made by Marbury and his associates, Madison had ignored the papers served upon him by the attorney for the plaintiffs, and had refused to dignify the proceeding by opposing it. Hence the order to show cause was granted without any formal opposition. It was now expected that Madison would not only ignore the proceeding when it came up for a final hearing, but that the President would refuse to furnish the evidence which was in the State Department concerning the appointment of the applicants and the signing of the commissions.

This eventually proved to be true. The plaintiffs were consequently compelled to go outside the official records for their evidence; and they therefore made application to the United States Senate for a transcript of the minutes of that body showing the confirmation of the appointment of the plaintiffs to the offices in question. This application caused much discussion, and was refused after the suit had been denounced by Republican leaders in the Senate as an attempt by the Judiciary to establish their supremacy over the Legislature and the Executive.

In opposing this motion, Senator Wright of Maryland said that the Senate was being called upon "to aid in an audacious attempt to pry into Executive secrets by a tribunal which had no authority to do any such thing, and to enable the Supreme Court to assume an unheard of and unbounded power, if not despotism. It is to enable the Judiciary to exercise an authority over the President which he can never consent to. . . . No Court on earth can control the Legislature, and yet it has been held here on the floor that they can, and this is a part of the same attempt to set the Court above the President and to cast a stigma upon him."

And Senator Breckinridge of Kentucky said:

"It is dangerous to countenance the pretensions set up by the Judges to examine into the conduct of the other branches of the Government; for if they have a right to examine, they must have, as a necessary incident, the right to control the other departments of Government. Such right is inconsistent with every idea of good government, and must necessarily degrade those branches which the Judiciary should thus undertake to direct. The present suit is therefore levelled at the dignity of the first Executive Magistrate, and the Senate is bound to protect that dignity." (Quoted in Warren, op. cit. I, p. 233)

The feeling among leading Republicans generally at that time, with respect to this suit and the rôle of the judiciary at that juncture of political affairs, is well illustrated in a letter written by Caesar A. Rodney, then a Congressman from Delaware, and within four years destined to become Attorney-General of the United States:

"The Judges—said the future Attorney-General—have made their début and have a proper congé. How strangely have they and their friends managed the business. Some fatality seems to attend every step our opponents take. The Supreme Court will proceed with caution, I should imagine, if the subject be brought before them, which I suspect will be the case. The opposition will try it perhaps in every shape of which this political Proteus is capable. They will wait, I presume, to see what length the Court dare go in the case of the justices and if encouraged sufficiently they will appear next on the stage. If they (i.e. the Judges of the Supreme Court) do assert unconstitutional powers, I confidently trust there will be wisdom and energy enough in the Legislative and Executive branches to resist their encroachments and to arraign them for the abuse of their authority at the proper tribunal. Such monstrous doctrines have been preached and such unlimited powers arrogated for them that I know not what they may possibly do. They should remember, however, that there is a boundary which they cannot pass with impunity. If they cross the Rubicon, they may repent when it will be too late to return. Judicial supremacy may be made to bow before the strong arm of Legislative authority. We shall discover who is master of the ship. Whether men appointed for life or the immediate representatives of the

people agreeably to the Constitution are to give laws to the community. The Judges have already undertaken in "evil times" to declare war in violation of that instrument which binds us together. I sincerely hope that they may take wit in their anger. They are hostile to us but they do not possess enough of the old Roman to sacrifice their salaries or even to risk them in the contest. They are not sufficiently disinterested." (Quoted in Warren, op. cit. I, pp. 228-9)

Such was the setting in which this famous case came to be heard. When it was called for hearing on February 9th, no one appeared for Madison, as was expected. There was therefore no trial in the ordinary sense, but what is termed among lawyers an inquest; the argument was all one-sided, no one appearing to answer the arguments which Mr. Charles Lee advanced in support of his motion.

Inquests are usually dull affairs, but this one was very far from dull. Indeed the court room presented an unprecedented spectacle, probably not to be duplicated soon again except, possibly, in the famous Burr impeachment.

In order to make his formal proof of the appointments and of the issuance of the commissions, Mr. Lee called several employees of the State Department; but, evidently under instructions from their superiors, they refused to answer all questions, on the ground that the knowledge acquired by them while in the employ of an executive department could not be revealed to any court without authority from the head of the department and ultimately from the President of the United States.

Mr. Lee then called Mr. Levy Lincoln, Attorney-General of the United States, who had served temporarily as President Jefferson's Secretary of State pending the appointment of James Madison to that office, and into whose custody the commissions in question had come when the Adams Administration had vacated. It was Mr. Lincoln who had received the order from President Jefferson not to deliver the commissions in question. But Mr. Lincoln also refused to answer the questions put to him by the court, giving the same reason. Thus Jefferson defied the Judiciary of the United States, insisting on his complete independence as a co-ordinate and independent branch of the Government of the United States.

Finally, however, Mr. Lee proved the necessary facts, and proceeded to present his argument. It is rather interesting when taken

in connection with the opinion which the Court subsequently delivered in the case. Mr. Lee thus summarized the questions presented for adjudication by the Court:

"1st. Whether the Supreme Court can award the writ of mandamus in any case?

"2nd. Whether it will lie to a Secretary of State in any case

whatever?

"3rd. Whether, in the present case, the court may award a mandamus to James Madison, secretary of state."

He then proceeded to discuss the nature of the writ of mandamus, and the term "appellate jurisdiction" which was involved in this question, quoted the act of Congress which he relied upon as giving the Supreme Court the power to issue the mandamus (being section 13 of the original Judiciary Law passed at the first session of the first Congress), and various judicial decisions in which this question had been discussed by the Supreme Court itself, and wound up this branch of the argument with the following statement:

"In none of these cases, nor in any other, was the power of this court to issue a mandamus ever denied. Hence it appears there has been a legislative construction of the constitution on this point, and a judicial practice under it, for the whole time since the formation of the government."

He then proceeded to argue the question whether a mandamus can properly be issued to the Secretary of State, which involved a discussion of the nature of the act which may be required to be done under a mandamus. And, finally, the question whether the plaintiffs were entitled to the issuance of their commissions, which he affirmed on the theory that the office had vested in them, since the commissions had been signed by the President and sealed by the Secretary of State, leaving nothing but the ministerial act of delivery which could be performed by any clerk of the State Department.

When Mr. Lee concluded his argument on February 14th, those who followed the case naturally awaited the decision with the keenest expectations, as it was to mark either an advance or a retreat on the part of the Court in its war upon the new administration and particularly upon President Jefferson. But no one expected the kind of decision that was actually rendered on February 14th, those who followed the case naturally awaited the decision with the

ruary 24th, and which has been the subject of the keenest interest and greatest controversy ever since. In order that our readers may appreciate the exact meaning of the case at that time, and what the actual decision has meant ever since, we must quote at some length from two historians—one, the noted historian of the United States Supreme Court; the other, the no less noted biographer of John Marshall.

In his Supreme Court, Mr. Warren says, at this point:

"While the main facts regarding the first of these cases (i.e. Marbury v. Madison), as given in the official report, are very familiar to the legal profession, a more complete study than has hitherto been made of contemporary writings portraying the details of the argument and the manner in which the decision was received throws much new light upon the actual reasons for the opposition which the decision evoked. The perspective of history is often enlightening, but it is also often misleading. The temptation is often strong to project the present aspect of a case back to the date of its decision, and thus to obtain an erroneous view of its contemporary importance. A decision gathers accretions with the passage of time, and frequently that portion of the opinion which was of greatest import at the time when it was rendered becomes subordinate to other considerations. This is particularly true as to the decision in Marbury v. Madison. To the lawyers of today, the significance of Marshall's opinion lies in its establishment of the power of the Court to adjudicate the validity of an Act of Congress—the fundamental decision in the American system of constitutional law. To the public of 1803, on the other hand, the case represented the determination of Marshall and his Associates to interfere with the authority of the Executive, and it derived its chief importance then from that aspect." (Warren, Supreme Court, I, pp. 231-2)

This statement is correct in so far as the general point of view is concerned, but it needs two emendations or illustrations before the case can be fully understood from the point of view indicated by Mr. Warren. In the first place, the statement contained in the last sentence is true of the case only as it appeared to its contemporaries prior to the actual decision. The very issuance of the rule to show cause against the Secretary of State and the Court's proceeding to hear the case, involved an assertion of power over the executive department which was considered by the opponents of the court as an unconstitutional and unwarranted interference

with a co-ordinate branch of the government. But not so the decision itself, as we shall see further below.

It must be borne in mind that no question of the constitutionality of any act of Congress had been raised up to the time of the actual delivery of the opinion and the decision of the case. Mr. Lee, on behalf of the plaintiffs, rested his case on two acts of Congress. One was Section 13 of the original Judiciary Law passed in 1789, which gave the Supreme Court the power to issue the writ of mandamus-although Mr. Lee claimed that the Court possessed that power even without a specific act of Congress. The other act relied upon by Mr. Lee was the District of Columbia Judiciary Law of 1801. Nor did anybody else question the constitutionality of either of these acts-for although the Republicans had attacked the Circuit Court Law of 1801 as unconstitutional, they do not seem to have questioned the constitutionality of the District of Columbia Law, although they probably opposed it on general grounds as part of the Federalist reorganization scheme. In any event, no one appeared on behalf of Madison to question the validity of this act-Jefferson taking the position that as long as the commissions remained undelivered the appointments were inoperative, or that he had the right to revoke them or dismiss the appointees by refusing to deliver the commissions.

Two questions were therefore up for decision before the Court, as the case was understood by all concerned at the time it was submitted to the Court: One was, whether or not the Court had the power to order the Executive by writ of mandamus to do an act which the Court thought the plaintiff had a right to demand of the Executive. The second was, whether Marbury and associates were entitled to the commissions. No one expected, or could have expected, that the question of the right of the Court to declare an act of Congress unconstitutional would come up in the case. And it was actually dragged in by the hair, so to speak, by Marshall himself, for purely political considerations. No one has stated this situation more clearly than the late Senator Beveridge, in his monumental Marshall biography. Says Senator Beveridge:

"For more than five years Marshall had foreseen the complicated and dangerous situation in which the country now found itself; and for more than a year he had, in his ample, leisurely, simple manner of thinking, been framing the constructive answer which he was at last forced to give to the grave question: Who

shall say with final authority what is and what is not law throughout the Republic? In his opinion in the case of Marbury v. Madison, to which this chapter is devoted, we shall see how John

Marshall answered this vital question. . . .

"Thus the one subject most discussed, from the campaign of 1800 to the time when Marshall delivered his opinion in Marbury v. Madison, was the all-important question as to what power, if any, could annul acts of Congress. During these years popular opinion became ever stronger that the Judiciary could not do so, that Congress had a free hand so far as the courts were concerned, and that the individual States might ignore National laws whenever those States deemed them to be infractions of the Constitution. As we have seen, the Republican vote in Senate and House, by which the Judiciary Act of 1801 was repealed, was also a vote against the theory of the supervisory power of the National Judiciary over National legislation.

"Should this conclusion go unchallenged? . . .

"The fundamental question as to what power could definitely pass upon the validity of legislation must be answered without delay. Some of Marshall's associates on the Supreme Bench were becoming old and feeble, and death, or resignation enforced by illness, was likely at any moment to break the Nationalist solidarity of the Supreme Court; and the appointing power had fallen into the hands of the man who held the subjugation of the National

Judiciary as one of his chief purposes.

"Only second in importance to these reasons for Marshall's determination to meet the issue was the absolute necessity of asserting that there was one department of the Government that could not be influenced by temporary public opinion. The value to a democracy of a steadying force was not then so well understood as it is at present, but the Chief Justice fully appreciated it and determined at all hazards to make the National Judiciary the stabilizing power that it has since become. It should be said, however, that Marshall no longer 'idolized democracy,' as he declared he did when as a young man he addressed the Virginia Convention of 1788. On the contrary, he had come to distrust popular rule as much as did most Federalists.

"A case was then pending before the Supreme Court the decision of which might, by boldness and ingenuity, be made to serve as the occasion for that tribunal's assertion of its right and power to invalidate acts of Congress and also for the laying-down of rules for the guidance of all departments of the Government. This was the case of Marbury v. Madison. . . .

"In executing his carefully determined purpose to have the Supreme Court formally announce the exclusive power of that tribunal as the authority of last resort to interpret the Constitution and determine the validity of laws by the test of that instrument,

Marshall faced two practical and baffling difficulties, in addition to those larger and more forbidding ones which we have already considered.

"The first of these was the condition of the Supreme Court itself and the low place it held in the public esteem; from the beginning it had not, as a body, impressed the public mind with its wisdom, dignity, or force. The second obstacle was technical and immediate. Just how should Marshall declare the Supreme Court to be the ultimate arbiter of conflicts between statutes and the Constitution? What occasion could he find to justify, and seemingly to require, the pronouncement as the judgment of the Supreme Court of that opinion now imperatively demanded, and

which he had resolved at all hazards to deliver?

"When the Republicans repealed the Federalist Judiciary Act of 1801, Marshall had actually proposed to his associates upon the Supreme Bench that they refuse to sit as circuit judges, and 'risk the consequences.' By the Constitution, he said, they were Judges of the Supreme Court only; their commissions proved that they were appointed solely to those offices; the section requiring them to sit in inferior courts was unconstitutional. The other members of the Supreme Court, however, had not the courage to adopt the heroic course Marshall recommended. They agreed that his views were sound, but insisted that, because the Ellsworth Judiciary Act had been acquiesced in since the adoption of the Constitution, the validity of that act must now be considered as established. So Marshall reluctantly abandoned his bold plan, and in the autumn of 1802 held court at Richmond as circuit judge. To the end of his life, however, he held firmly to the opinion that in so far as the Republican Judiciary Repeal Act of 1802 deprived National judges of their offices and salaries, that legislation was unconstitutional.

"Had the circuit judges, whose offices had just been taken from them, resisted in the courts, Marshall might, and probably would, have seized upon the issue thus presented to declare invalid the act by which the Republicans had overturned the new Federalist Judiciary system. Just this, as we have seen, the Republicans had expected him to do, and therefore had so changed the sessions of the Supreme Court that it could not render any decision for more

than a year after the new Federalist courts were abolished.

"Certain of the deposed National judges had, indeed, taken steps to bring the 'revolutionary' Republican measure before the Supreme Court, but their energies flagged, their hearts failed, and their only action was a futile and foolish protest to the very Congress that had wrested their judicial seats from under them. Marshall was thus deprived of that opportunity at the only time he could have availed himself of it.

"A year afterward, when Marbury v. Madison came up for

decision, the entire National Judiciary had submitted to the Republican repeal and was holding court under the Act of 1789. . . .

"Charles Lee, former Attorney-General, counsel for the applicants, argued the questions which he and everybody else thought were involved. He maintained that a mandamus was the proper remedy, made so not only by the nature of the relation of the Supreme Court to inferior courts and ministerial officers, but by positive enactment of Congress in the Judiciary Law of 1789. Lee pointed out that the Supreme Court had acted on this authority in two previous cases.

"Apparently the court could do one or the other of two things: it could disavow its power over any branch of the Executive Department and dismiss the application, or it could assert this power in cases like the one before it and command Madison to deliver the withheld commissions. It was the latter course that the Republi-

cans expected Marshall to take.

"If the Chief Justice should do this, Madison undoubtedly would ignore the writ and decline to obey the court's mandate. Thus the Executive and Judicial Departments would have been brought into direct conflict, with every practical advantage in the hands of the Administration. The court had no physical means to compel the execution of its order. Jefferson would have denounced the illegality of such a decision and laughed at the court's predicament. In short, had the writ to Madison been issued, the court would have been powerless to enforce obedience to its own mandate.

"If, on the contrary, the court dismissed the case, the Republican doctrines that the National courts could not direct executives to obey the laws, and that the Judiciary could not invalidate acts

of Congress, would by acquiescence have been admitted.

"No matter which horn of the dilemma Marshall selected, it was hard to see how his views could escape impalement. He chose neither. Instead of allowing his cherished purpose of establishing the principle of supervisory power of the Judiciary over legislation to be thus wounded and perhaps fatally injured, he made the decision of this insignificant case—about which the applicants themselves no longer cared—the occasion for asserting that principle. And he did assert that principle—asserted it so impressively that for more than a century his conclusion has easily withstood repeated assaults upon it, which still continue.

"Marshall accomplished his purpose by convincing the Associate Justices of the unconstitutionality of that section of the Ellsworth Judiciary Act of 1789 which expressly conferred upon the Supreme Court the power to issue writs of mandamus and prohibition, and in persuading them to allow him to announce that conclusion as the opinion of the court. When we consider that, while all the Justices agreed with Marshall that

the provision of the Ellsworth Judiciary Law requiring them to sit as circuit judges was unconstitutional, and yet refused to act upon that belief as Marshall wanted them to act, we can realize the measure of his triumph in inducing the same men to hold unconstitutional another provision of the same act—a provision, too, even less open to objection than the one they had sustained.

"The theory of the Chief Justice that Section 13 of the old Judiciary Law was unconstitutional was absolutely new, and it was as daring as it was novel. It was the only original idea that Marshall contributed to the entire controversy. Nobody ever had questioned the validity of that section of the statute which Marshall now challenged. Ellsworth, who preceded Marshall as Chief Justice, had drawn the act when he was Senator in the First Congress; he was one of the greatest lawyers of his time and an influ-

ential member of the Constitutional Convention.

"One of Marshall's associates on the Supreme Bench at that very moment, William Paterson, had also been, with Ellsworth, a member of the Senate Committee that reported the Judiciary Act of 1789, and he, too, had been a member of the Constitutional Convention. Senators Gouverneur Morris of New York, William S. Johnson of Connecticut, Robert Morris of Pennsylvania, William Few of Georgia, George Read and Richard Bassett of Delaware, and Caleb Strong of Massachusetts supported the Ellsworth Law when the Senate passed it; and in the House James Madison and George Wythe of Virginia, Abraham Baldwin of Georgia, and Roger Sherman of Connecticut heartily favored and voted for the act. Most of these men were thorough lawyers, and every one of them had also helped to draft the National Constitution. Here were twelve men, many of them highly learned in the law, makers of the Constitution, draftsmen or advocates and supporters of the Ellsworth Judiciary Act of 1789, not one of whom had ever dreamed than an important section of that law was unconstitutional.

"Furthermore, from the organization of the Supreme Court to that moment, the bench and bar had accepted it, and the Justices of the Supreme Court, sitting with National district judges, had recognized its authority when called upon to take action in a particular controversy brought directly under it. The Supreme Court itself had held that it had jurisdiction, under Section 13, to issue a mandamus in a proper case, and had granted a writ of prohibition by authority of the same section. In two other cases this section had come before the Supreme Court, and no one had even intimated that it was unconstitutional. . . .

"But the exigency disclosed in this chapter required immediate action, notwithstanding the obstacles above set forth. The issue raised by the Republicans—the free hand of Congress, unrestrained by courts—must be settled at that time or be abandoned perhaps

forever. The fundamental consideration involved must have a prompt, firm, and, if possible, final answer. Were such an answer not then given, it was not certain that it could ever be made. As it turned out, but for Marbury v. Madison, the power of the Supreme Court to annul acts of Congress probably would not have been insisted upon thereafter. For, during the thirty-two years that Marshall remained on the Supreme Bench after the decision of that case, and for twenty years after his death, no case came before the court where an act of Congress was overthrown; and none had been invalidated from the adoption of the Constitution to the day when Marshall delivered his epochal opinion. So that, as a matter of historical significance, had he not then taken this stand, nearly seventy years would have passed without any question arising as to the omnipotence of Congress. After so long a period of judicial acquiescence in Congressional supremacy it seems likely that opposition to it would have been futile.

"For the reasons stated, Marshall resolved to take that step which, for courage, statesmanlike foresight, and, indeed, for perfectly calculated audacity, has few parallels in judicial history. In order to assert that in the Judiciary rested the exclusive power to declare any statute unconstitutional, and to announce that the Supreme Court was the ultimate arbiter as to what is and what is not law under the Constitution, Marshall determined to annul

Section 13 of the Ellsworth Judiciary Act of 1789. . . .

"Nothing but the emergency compelling the insistence, at this particular time, that the Supreme Court has such a power, can fully and satisfactorily explain the action of Marshall in holding this section void." (Beveridge, Marshall, III, pp. 104-133)

Such is the official version of what Marshall had set out to do. But that also requires some emendations. For Marshall's great biographer was evidently influenced in the statement of this case by the erroneous attitude criticized by Mr. Warren, and imputed to Marshall our present-day view on the subject.

There is no doubt that Marshall was anxious to officially announce the new theory of the Judicial Power, on which he had succeeded in uniting his associates, after long hesitation and doubts. There can also be no doubt of the fact that in order to accomplish this political purpose, he went out of his way to impart into the case a question that was not there and to declare an act of Congress unconstitutional when there was absolutely no occasion for it—practices which have since been condemned by the Supreme Court itself.

But there is no doubt that this was not Marshall's only pur-

pose; nor, indeed, his main purpose. The main purpose was his attack upon the Executive, and not upon the Legislature; and his opinion as actually delivered proves this conclusively. Let us therefore look at that opinion.

The first thing that strikes us about it is that it reverses the order of the questions which were up for decision by the Court from that in which Mr. Lee, the counsel for plaintiffs, had stated them. If Marshall's only purpose had been merely to announce the Court's authority to declare an act of Congress unconstitutional, he would naturally have taken up the questions in the order presented to him by counsel in the argument of the case, which was also the logical order of considering the case, for the first and fundamental question was the power of the court to issue the writ of mandamus. If Marshall had done that he would have had his opportunity of declaring Section 13 of the Judiciary Act of 1789 unconstitutional. But that would have been the end of the matter. He would never have had a chance of considering Mr. Marbury's right to the commission, and therefore could not have excoriated Jefferson for failure to deliver the same, nor have asserted the right of the Judiciary to order its delivery by the Executive.

That this reversal of the order of the argument was considered unusual, and required a sort of apology from the Court, is shown by the introductory paragraphs of Marshall's opinion. After stating that Madison had failed to "show cause," the Chief Justice proceeds as follows:

"The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded.

"These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the court, there will be some departure in form, though not in substance,

from the points stated in that argument.

"In the order in which the court has viewed this subject, the

following questions have been considered and decided.

"1st. Has the applicant a right to the commission he demands? "2d. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

"3d. If they do afford him a remedy, is it a mandamus issuing

from this court?"

After thus practically apologizing for the *order* of his opinion, Marshall proceeds to consider at length Mr. Marbury's right to the commission, and concludes this part of his opinion with the following statement:

"Mr. Marbury, then, since his commission was signed by the President, and sealed by the Secretary of State, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country.

"To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal

right.

"This brings us to the second inquiry; which is,

"2d. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?"

Marshall then proceeds to discuss this branch of the case at great length; the salient points made by him on this branch of the case being as follows:

"The very essence of civil liberty—says Marshall—certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court. . . .

"The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no rem-

edy for the violation of a vested legal right.

"If this obloquy is to be cast on the jurisprudence of our coun-

try, it must arise from the peculiar character of the case.

"It behooves us, then, to inquire whether there be in its composition any ingredient which shall exempt it from legal investigation, or exclude the injured party from legal redress. . . .

"Is it to be contended that the heads of departments are not

amenable to the laws of their country? . . .

"It follows, then, that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.

"If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its juris-

diction.

"In some instances there may be difficulty in applying the rule

to particular cases; but there cannot, it is believed, be much diffi-

culty in laying down the rule. . . .

"The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

"If this be the rule, let us inquire how it applies to the case

under the consideration of the court. . . .

"The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which a suit had been instituted against him, in which his defense had depended on his being a magistrate, the validity of his appointment must have been determined by judicial authority.

"So, if he conceives that, by virtue of his appointment, he has a legal right either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment. . . .

"It is, then, the opinion of the Court,

"1st. That by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace for the county of Washington, in the District of Columbia; and that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

"2d. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him

a remedy.

"It remains to be inquired whether,

"3d. He is entitled to the remedy for which he applies. This depends on,

"1. The nature of the writ applied for; and,

"2d. The power of this court.

"1st. The nature of the writ. . . .

"This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, 'to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined, or at least supposes, to be consonant to right and justice.' Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.

"These circumstances certainly concur in this case.

"Still, to render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it

must be without any other specific and legal remedy.

"1st. With respect to the officer to whom it would be directed. The intimate political relation subsisting between the President of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

"It is scarcely necessary for the court to disclaim all pretensions to such jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the

executive, can never be made in this court.

"But, if this be not such a question; if, so far from being an intrusion into the secrets of the cabinet, it respects a paper which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim, or to issue a mandamus directing the performance of a duty, not depending on executive discretion, but on particular acts of congress, and the general principles of law? . . .

"This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only re-

mains to be inquired,

"Whether it can issue from this court."

Marshall then proceeds to examine Section 13 of the Judiciary Act which gives the Supreme Court power to issue writs of mandamus, and to compare it with the provision of the United States Constitution, which says that:

"The Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction."

He considers the problem from two points of view: First, whether the provision of the Judiciary Law of 1789 giving the Supreme Court the right to issue a writ of mandamus is in accordance with the provision of the Constitution; and, second, whether, if the provisions of the Judiciary Law are not in accordance with the Constitution, "a jurisdiction so conferred can be exercised?"

After considering at some length the distinction between original and appellate jurisdiction, and whether the Constitution intended to itself apportion the jurisdiction between the Supreme Court and the inferior federal courts, or left this matter to the discretion of Congress, Marshall closes this part of the discussion as follows:

"To enable this court, then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

"It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must

be appellate, not original.

"It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

"The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether

a jurisdiction so conferred can be exercised."

And, here, at the tail end of a long opinion, comes the famous argument in favor of the right of the Court to disregard an act of the legislature when it deems it unwarranted by the Constitution, which is supposed to have been the great act of statesmanship of Marshall's life, and the basis of the American Doctrine of the Judicial Power as we know it today.

The decision, as we know, was that, unfortunately, the Court was without power to issue the writ directing Mr. Madison to deliver the commissions in question. Messrs. Marbury et al. must therefore be turned out of court.

Mr. Warren, commenting on the reception accorded to the decision by the public and press, expresses surprise at the fact that the public remained indifferent, and that whatever criticism there was, was directed toward the wrong part of the decision. This proves that even historians who caution others against the error of projecting our views of historic events back to its contemporaries, do not always act upon their own precepts. For it is perfectly obvious to anyone who really considers the situation as it was then, that the decision should have been received by its contemporaries in exactly the manner that it was received.

Says Mr. Warren:

"While the Federalist commendation of Marshall's opinion was profuse, it is surprising to note that the most bitterly partisan Republican papers, like the Administration organs, the National Aegis in Massachusetts and the National Intelligencer, and the violent opponents of Federalism like the Aurora in Philadelphia, and the American Citizen in New York, made no criticism of the decision; and contrary to the views advanced by opponents of the Court in later days, these Republican papers showed no antagonism whatever to Marshall's view of the right of the Court to pass upon the constitutionality of an Act of Congress."

Viewed from our present position, Mr. Warren's criticism of the contemporaries of Marbury v. Madison may be justified; but from the point of view of those contemporaries, and taking into consideration human nature as it is, their action is not at all surprising. In fact, we should have been surprised if it had been different. Here was a case in which the public was greatly interested. It was agog with excitement, watching a struggle between two great antagonists, Federalists and Anti-Federalists, or Marshall and Jefferson. Marshall had attacked Jefferson by is-

suing the rule to show cause, and the question was: Will he proceed further in his attack, or retreat? Marshall, after calling Jefferson a lot of abusive names, retreated. Marshall's claque applauded, of course. But what were Marshall's opponents to do? Some of them took exception to Marshall's abuse, and the very farsighted ones took exception to the blow below the belt. But on the whole they were content and satisfied to leave well-enough alone. Some of them may have even thought it good manners not to abuse a fallen or retreating foe.

The decision was unquestionably a great victory for the Jeffersonians; and even some very intelligent people failed to appreciate at what cost they had obtained this victory. This has occurred again and again in the course of our judicial history. One of the late instances that comes to our mind is the victory which the liberal forces of this country are supposed to have scored in the famous case of Muller v. Oregon, decided by the United States Supreme Court in 1908. It will be recalled that that decision was hailed as a great victory by the liberals, who had been fighting the improper exercise of the Judicial Power in declaring labor laws unconstitutional by the wholesale. Here were people opposed to the Judicial Power, at least as it was then being exercised, who had been severely criticizing the Judiciary and particularly the United States Supreme Court for the manner in which it used its power—and a decision apparently limiting this abuse. When the decision came down a shout of victory went forth, as was only natural and human. All too human. It was only natural that in the tumult of the "victory celebration" gentlemen did not notice that the decision which they were celebrating contained a further step, and a long one, in the forward march of that very Judicial Power that they had been criticizing and attacking for years. Why, then, should a different course of action be expected from the contemporaries of Marbury v. Madison?

It is only now, after the lapse of more than a century, that we can appreciate the full meaning of the opinion in Marbury v. Madison, of which Mr. Beveridge says:

"Thus, by a coup as bold in design and as daring in execution as that by which the Constitution had been framed, John Marshall set up a landmark in American history so high that all the future could take bearings from it, so enduring that all the shocks the Nation was to endure could not overturn it. Such a decision

was a great event in American history. State courts, as well as National tribunals, thereafter fearlessly applied the principle that Marshall announced, and the supremacy of written constitutions over legislative acts was firmly established." (Beveridge, Marshall, III, p. 142)

Senator Beveridge's characterization of the *coup* is undoubtedly justified; although the rhetoric which follows is somewhat exaggerated, and the statement in the last sentence quite unwarwanted by the facts.

It is true that State courts as well as National tribunals thereafter cited Marbury v. Madison as authority for the exercise of the Judicial Power, when they came to exercise it. But "thereafter" was considerably away in the future. Very much so, in fact, as far as the Federal Judiciary is concerned, in its relation to its own co-ordinate branch of government—as an examination of the judicial history of the country subsequent to Marbury v. Madison will disclose.

Regarded merely as a judicial decision, the opinion in Marbury v. Madison is remarkable chiefly for the many errors it contains. Regarded as a political pamphlet, it has been praised by admirers of Marshall as a huge success. But we are concerned here with neither of these phases of this famous opinion: We are concerned only with that part of it which, in Mr. Beveridge's flowery language, "set up a landmark in American history so high that all the future could take bearings from it"—i.e. the theory that the Judiciary had a right to declare an Act of the Legislature unconstitutional.

"In establishing this principle—says Marshall's biographer—Marshall was to contribute nothing new to the thought upon the

The legal errors of Marbury v. Madison are of no particular interest here, although in view of Marshall's great rôle in our constitutional history none of his errors can be considered unworthy of serious consideration. The student of the subject is therefore referred to an excellent discussion of the subject in Prof. Corwin's essay on Marbury v. Madison, in his The Doctrine of Judicial Review (1914). There are two points, however, not made in that essay to which we would like to call attention. In his opinion Marshall refers, and makes much of, an alleged case against the Secretary of War in which the question of mandamus was supposed to have been involved. Mr. Coxe says—and we believe correctly—that no such case ever existed. This would make Marshall to be as careless a historian as he was a legal writer. More important, however, is the second point: Since Prof. Corwin wrote his examination of Marbury v. Madison the United States Supreme Court has decided the case of Myers v. United States, in which the United States Supreme Court has officially decided that Marshall was wrong on the merits of the case involved in the Marbury suit. See discussion of the Myers case, infra, Chapter XXIX.

subject. All the arguments on both sides of the question had been made over and over again since the Kentucky and Virginia Resolutions had startled the land, and had been freshly stated in the Judiciary debate in the preceding Congress. Members of the Federalist majority in most of the State Legislatures had expressed, in highly colored partisan rhetoric, every sound reason for the theory that the National Judiciary should be the ultimate interpreter of the Constitution." ²

But the fact that Marshall did not contribute any new thought to the subject does not deprive this opinion of any interest. On the contrary, it adds to it. For, concededly, Marshall gave the best form to the arguments for this right; and if, therefore, he was merely putting the thought then generally prevalent on this subject in the best possible form, that form is the best avenue of approach to it, and furnishes the best basis for its evaluation. Let us therefore look at this argument a little more closely.

The first thing to be noted about Marshall's exposition of the theory of the Judicial Power, is that he does not base it on any express or special provision of the Constitution he was considering. On the contrary, he claims that this power is implicit in all written constitutions which set limitations upon the powers of the legislature, as do practically all written constitutions. If any reference is made to the text of any part of the United States Constitution it is not for the purpose of finding an express grant of power, but merely by way of confirmation of the theory that such power is necessarily given to the Judiciary by every written constitution which limits the power of the legislature. After referring to several texts of the United States Constitution for the purpose of illustrating the absurdity of the idea that the Judiciary ought not to have the power claimed, Marshall says:

² Senator Beveridge's statement quoted in the text indicates the great confusion in which the discussion of our subject is involved—a confusion which makes clear thinking rare even among the best informed. The statement quoted in the text would indicate that he was of the opinion that our subject—that is to say, the right of the Judiciary to annul laws made by the legislative department of its own sover-eignty—was involved in the Virginia and Kentucky resolutions. As a matter of fact that was not the case. While it is true that the supporters of the judicial power used broad language, the question immediately involved and the nature of the arguments adduced clearly show that what the speakers actually had in mind was the question of federal relations. This is indicated by Senator Beveridge's reference to the "National Judiciary," which has only a place in a discussion of federal relations. There is no difference between national judiciary and other judiciary in our subject.

"From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature."

Not that the framers expressly prescribed the United States Constitution as a "rule for the government of courts," but that they "contemplated" it as such. And this contemplation the framers of the United States Constitution had in common with the framers of all other written constitutions. For—

"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void."

That Marshall did not rely on any express grant in the Constitution, but merely on the fact that the Constitution was written and the powers of the legislature thereby limited, is also conclusively proven by the opening paragraph of this part of his opinion, which is as follows:

"The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interests. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it."

The question has nothing to do with the text of the United States Constitution. It depends on certain well-recognized principles instead of any specific provisions of the Constitution. Marshall therefore proceeds to examine those principles, and not the text of the Constitution. And if he cites a few passages from the Constitution, it is merely to illustrate his reductio ad absurdum argument.

It is interesting to note in this connection that Mr. Brinton Coxe, who believed that there was an express grant of this power in the United States Constitution, and set out to write a learned treatise to prove it, concedes that Marshall did not think so, and that Marshall's opinion was based not upon an express grant, but solely upon inferences from the nature of the Constitution and its general provisions which limited the power of the legisla-

ture. After a lengthy and detailed examination of that portion of the opinion in *Marbury v. Madison* which deals with this subject, Mr. Coxe comes to the following conclusion:

"The foregoing review,—says he,—it is contended, makes it evident that Mr. McMurtrie is correct in his emphatic assertion as to the nature of Marshall's reasoning on the constitutional question in Marbury v. Madison. That is to say, he is entirely correct in affirming that the said reasoning proceeds exclusively upon implication and inference in drawing the conclusion that a judicial court can declare a law to be unconstitutional and void.

"It is a consequence of this conclusion being true, that any writer who maintains that such a judicial competency is matter of express import according to the constitutional text, must proceed otherwise than Marshall, and must reason upon a basis different from the opinion in Marbury v. Madison." (Coxe, op. cit., p. 67)

The next thing to be noted is that the chief basis of the inference or implication upon which this power is based by Marshall is the fact that the Constitution is written. We have already shown in our introductory chapter how utterly false such an inference is, as proven by the entire history of the civilized world since the adoption of the United States Constitution. Part of this history had already been made at the time Marshall wrote his opinion in Marbury v. Madison, and was known to himnotably the French constitution of 1791. In view of that instrument, Marshall was simply stating an untruth when he said "all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the legislature repugnant to the constitution is void." Those who framed the French constitution of 1791 certainly did not contemplate that instrument in that way; and the theory of the French government under that written constitution up to the time of the writing of the opinion in Marbury v. Madison was not such as is stated by Marshall.

But this is not the only inference upon which Marshall based his theory of the Judicial Power which was false at the time he wrote his opinion, as proven by the past history of the civilized world. Mr. Coxe points out another one. Referring to Marshall's assertion that—"it is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule"—Mr. Coxe says:

"The postulate in question is thus certainly an inference, and furthermore, an incorrect inference, if the powers belonging to sovereign legislators and legislatures in other civilized nations be appealed to. This conclusion must be admitted to be correct by all; even by those who believe that Marshall's idea of judicial duty is the true conception of jus dicere, and that the ordinary interpretation is in all cases judicial, while legislative interpretation is extraordinary in all the cases in which its existence is possible. The question is not whether Marshall's postulate ought to be law everywhere, but whether it is and has been law everywhere, especially in the countries of the Civil law." (Coxe, op, cit., p. 61)

These two inferences made by Marshall from the nature of the Constitution, form the very foundation of his theory; and with the proof of their falsity the theory itself remains hanging in the air.

The next thing to be noted about Marshall's opinion is the absence of any reference to the framers of the United States Constitution and their intentions. This is particularly remarkable since Marshall was a contemporary of the framing of the Constitution and was speaking to contemporaries. Not only that, but one of the Associate Justices who had concurred in this opinion, Mr. Justice Paterson, was a leading member of the Constitutional Convention. Clearly, no one was in a better position to speak authoritatively as to what was said on the subject by the Framers while making this Constitution than was Mr. Justice Paterson. What was said at the time the Constitution was up for adoption in the various State Conventions, and in the pamphlet literature of the time, was of course matter of common knowledge. And since the Constitution itself was silent on the subject and resort had to be had to inferences in order to prove the intentions of the Framers, the utter failure to refer to these intentions as stated by them is most curious, to say the least. Or, is it possible that Marshall was afraid to touch the delicate subject of the actual intentions of the Framers for fear of the proof that was still available, and might be produced by his opponents, if the actual intentions be referred to instead of their supposed intentions, arrived at by a process of abstract logical deduction?

It may be of interest to note at this point that James Madison, the defendant in *Marbury v. Madison*, had kept a careful record of the proceedings of the Federal Convention, and that is today our only record of what was actually said in that convention. Is it possible that Marshall was afraid that, although Madison had ignored this case up to now, he might not ignore the opinion if resort were had to the actual instead of the logical intentions of the Framers?

But not only is Marshall's opinion devoid of any foundation because his basic inferences are historically untrue, but it is vulnerable even when tested by his own favorite logical method. Outside of the unwarranted assumption and inferences made by him, Marshall's opinion on this point consists of only one argument: The reductio ad absurdum. An attempt is made to reduce to an absurdity the contrary position, by a citation of a few provisions of the Constitution, followed by the rhetorical query: What would happen to these provisions if the Legislature were uncontrolled by the Judiciary? But the reductio ad absurdum is a doubleedged sword. And in this case the absurdities which follow from the granting of Marshall's position are greater a thousand-fold than those which follow the assumption of the contrary position—which is the reason why mankind has chosen to take the position contrary to that taken by Marshall. This, notwithstanding Marshall's very able brief for his position, about which Mr. McMurtrie has said that its logic was so compelling as to make it impossible "for a sane mind to question."

We shall have occasion to discuss elsewhere some of the more important absurdities that flow from Marshall's position. Here we shall point out a few minor ones, which are, however, sufficient to illustrate the general situation. Throughout this discussion it must be remembered that Marshall's claim is not that the courts have a right to declare an act of the legislature unconstitutional, but that an act of the legislature not authorized by the Constitution is void, and therefore cannot be enforced by the courts.

This distinction is not merely a lawyer's quibble. It is a fundamental position with Marshall, and it had to be a fundamental position with him because that is the only position which could be based on inference. Also, that was the position of his generation so far as it admitted this power. It was the position of Hamilton, Madison, and Jay, in *The Federalist*. It was the position of

Mr. Justice Iredell in his famous letter of 1787. It was the position of Mr. Justice James Wilson in his lectures on the law in 1791. But it is part of that position, if the logic of the thing is to be consulted—and the very existence of the power depends on that logic—that anybody who is called upon to act in connection with such a law acts at his peril, and must decide for himself whether the law is unconstitutional, and it is his duty to act according to his own opinion and take the consequences.

As Mr. Justice Wilson boldly put it: It is as much the duty of a good citizen to disobey an unconstitutional law, as it is his duty to obey a constitutional law. And this is the position which has been taken by the followers of Marshall ever since. It is the position taken by Mr. Abbot in his famous Concurring Memorandum.

The reader will remember Mr. Abbot's reference to the poor sheriff. But the position of the sheriff is not only unfortunate, it is utterly absurd. Is it possible that, in our complicated society, the law should give to everybody the right, and place upon everybody the duty, of determining for himself what laws are valid and what invalid? Is it possible that the sheriff and others who are called upon to execute judgments are constantly acting at their own peril? And is it possible that the Framers intended to put all that into the Constitution without saying so?

That such a theory was utterly absurd was authoritatively established only five years before the decision of Marbury v. Madison by no less an authority than the United States Supreme Court itself. Our readers will recall the decision of the Supreme Court in Calder v. Bull. In that case the Supreme Court decided that the Federal Judiciary has no right to declare unconstitutional, or, in Marshall's phrase, to consider void, a state law because of repugnancy to the state constitution. But if the right of the judiciary to disregard a law depends not upon an express grant to declare legislation unconstitutional, but on the law itself being utterly void—what difference does it make what makes the law void, or who are the judges before whom the question is raised? An "utterly void" law is, naturally, utterly void, and if so, it matters not when, where, by whom, or before whom, the question is raised. We again refer our readers to Mr. Abbot's famous Concurring Memorandum, in which that eminent lawyer, writing in express agreement with all the other eminent lawyers on his great committee, in an official document issued by the greatest body of lawyers in the United States, assures us that if the sheriff, or any other person, had proceeded under the unconstitutional decision of the court of first instance in the *Lewkowicz Case*, and the matter had somehow come before the courts of some other state or some other country, that court would have been bound to form an independent opinion as to the constitutionality of the law in question and act upon such independent judgment.

Mr. Abbot and the other eminent lawyers on his committee had evidently been so carried away by Marshall's reasoning as to the logic of the situation that they had entirely overlooked not only the customs of the civilized world but also the decisions of the United States Supreme Court since Calder v. Bull. But that only illustrates the more strikingly the utter absurdity of the position taken by Marshall that an act of a sovereign legislature may be utterly void.

But while Marshall and his associates and successors could be guilty of these absurdities when rationalizing a position which they assumed and maintained for other than logical reasons, they could not go on committing them in practical life. Hence the very common-sense decision in Calder v. Bull, decided before Marbury v. Madison but adhered to ever since, that a void law may nevertheless be binding not only on a sheriff, but even on the Federal Judiciary itself, including the United States Supreme Court, if it happened to be void only because of repugnancy to a state constitution.

It goes without saying that no state of our union has, or ever claimed, the right to disregard a law of another state held valid by the courts of that state; for the reason that in its opinion the law is invalid for repugnancy to the constitution of its own state. But if Marshall's position that an act of the legislature repugnant to the constitution of its own government is utterly void, it would follow logically that it must be so held not only by the judiciary of its own government but also by other courts in which it may ever be questioned.

Following Marshall's own mode of reasoning from dilemmas, we are therefore presented with this dilemma: Either Marshall's reasoning is utterly wrong; or else the practice of all the courts of this land, including the United States Supreme Court itself, in considering themselves bound by void laws which have been held

valid by the judiciary of the government under which they were promulgated, has been and is utterly wrong. For ourselves, we unhesitatingly say that the practice of all of our courts in following the decision in Calder v. Bull conclusively establishes that Marshall's theory was all wrong. And the reason that the decision in Calder v. Bull has been followed, instead of the logic of Marbury v. Madison, is because that logic would lead to practical absurdities—to a state of anarchy, in fact.

This brings us to another point which we desire to note about the opinion in Marbury v. Madison. Nowhere in that opinion does Marshall use the word "unconstitutional." The Supreme Court in Marbury v. Madison did not declare Section 13 of the Judiciary Act of 1789 unconstitutional, but merely refused to act upon it because it regarded it as void.

We have already pointed out that this was not a mere quibble, but a statement of a fundamental position. That position was this: That the Judiciary were not the special guardians of the Constitution, appointed to that office by the provisions of the Constitution itself. It was not the "supreme authority" of the American system of government, established by the United States Constitution. The Judiciary, therefore, had no right to declare any law unconstitutional in the sense of nullifying that law or destroying it. It was, however, one of three independent and co-ordinate branches of the government, and as such it was not bound by the opinion of the Legislature as to the meaning of the Constitution, and could decide the question of constitutionality for itself; and having come to the conclusion that the law was void for repugnance to the Constitution, disregard it in its own decisions.

Such was Marshall's position. We have already seen Madison's complaint with respect thereto, that in practice it made the Judiciary superior to the Legislature. Nevertheless, the distinction was important, not only in theory but also in practice, as we shall have occasion to show in the further course of this work. Indeed, the distinction is so deep that if it were actually observed in practice, the Judicial Power would not be what it is today.

There is yet another aspect of the decision of Marbury v. Madison which must be considered before we are through with that famous case.

Under our system of jurisprudence, a court decision has a double aspect: 1. As an adjudication of the rights of the parties to

the litigation; and 2. As a precedent for similar cases in the future.

The opinion given by the Court is important in both aspects, but chiefly in the second. An opinion is primarily and formally a statement of reasons for the decision of the case in hand, and therefore seemingly relates only to the first aspect of the case referred to by us. In reality, however, its true importance lies in the second aspect: In placing on record, for the guidance of other judges in future cases, the reasons why this case was decided in the manner that it was decided. As far as the determination of the rights of the litigants in a particular case is concerned, no opinion is required to be given by the court. But without an opinion the case could hardly be a precedent under the rule of stare decisis, since the reasons for the decision could not be known in the absence of an opinion, and few cases involve but one point. But not everything that is stated in an opinion is of equal importance in this connection. A mere theoretical discourse by a judge on a point not necessary for the decision does not come within the rule of stare decisis. It has no more value than the private expression of an opinion of any other lawyer of standing. Its value then depends upon the standing of the judge who gave the opinion; but in no event has it the compulsion of a decision. If the judge happens to be of high standing as a jurist, and his opinion is well reasoned, it is likely to be followed. Not under the rule of stare decisis, however, but because of the appeal which the cogency of the reasoning may possess.

Such opinions are known to the legal profession as dicta, in contradistinction from those opinions which form the basis of a decision, what is known as the ratio decidendi. So, for instance, that portion of Marshall's opinion in Marbury v. Madison relating to the right of Mr. Marbury to his commission and the duty of the President to deliver the same to him, was, in the opinion of some learned authors mere dictum, notwithstanding that it was placed in the forefront of the opinion. Since the court decided that it had no jurisdiction in the case, it could not, strictly speaking, pass on the rights of the litigants involved; and, therefore, when it did express an opinion on the subject that opinion did not constitute a decision of the court, but merely an expression of the opinion of the judges composing the court. It might be followed by other judges because of the weight carried by the par-

ticular court as the cogency of the reasoning but not because of the rule of stare decisis. It would not be binding as a decision, although it might be persuasive as an argument.³

It was because of this distinction between a mere dictum and a decision, that it was necessary for Marshall to actually declare some particular law unconstitutional in order to make his action a precedent. Had he merely stated his views in the very words in which they are stated in Marbury v. Madison, but without actually declaring some law unconstitutional so as to make the invalidity of that law the ratio decidendi of some case, his opinion would have been of no more value than that expressed by Judge Wilson in his lectures in 1791.

As Marshall had set out to establish a precedent, it was necessary for him to actually declare a law unconstitutional. Hence his action, otherwise inexplicable, of declaring unconstitutional a law which was clearly constitutional, and under which his own associates had repeatedly acted on the assumption that it was constitutional, as shown in the passages quoted above from Marshall's biographer, a position which will hardly be disputed now. It was the fact of decision which made possible Mr. Beveridge's rhetorical reference to the "landmark in American history."

But is the decision in Marbury v. Madison the precedent it is claimed to be? A careful examination of the case will show that it is very far from being all that it is claimed to be by the supporters of the Judicial Power, notwithstanding the fact that Marshall's opinion on this point is not a mere dictum.

In order that our readers may see the importance of the distinction we are about to make, we must dwell a little further on the theory of stare decisis and its meaning in our jurisprudence.

It frequently happens that in order to decide a case the court lays down a rule of law in general terms covering the particular case as well as other cases which may be different in their facts from the case "at bar." In such a situation the rule of stare decisis does not make the case a precedent for all of the cases coming within the rule laid down by the court in general or broad terms, but only in so far as it was applicable to the facts of the case actually decided. In other words, when an opinion given in a certain case is cited, the weight of the opinion as an opinion goes of course

States Supreme Court, in Myers v. United States.

to the full extent of the rule laid down in the case cited. But the weight of the case as a precedent is limited to the facts in the case, even though in deciding upon those facts a general rule had been laid down which goes beyond those facts.

Viewed in this light, the decision in Marbury v. Madison is not an adjudication, in the sense of establishing a precedent, that a court may disregard as invalid any law adopted by the legislature which may, in the opinion of the court, be repugnant to the Constitution, although that rule is laid down by Marshall in the broadest terms imaginable. So far as the decision in Marbury v. Madison established any precedent, it only went to the extent of deciding that under a written constitution establishing three independent and co-ordinate branches of government, and prescribing limitations upon the power of the legislature, and establishing a court the powers of which are expressly defined in the constitution, the legislature has no power either to diminish or to increase the powers of that court; and if it attempts to do so, that court has a right to disregard such act of the legislature.

In this connection it must be remembered that the act of Congress in question was not a general law, in the ordinary sense of that word, but a law relating particularly to the Judiciary in a matter expressly covered by the Constitution itself. Such at least was Marshall's own assertion, and his decision proceeded upon the assumption.

One may very well concede that under such circumstances the Legislature has no right to diminish, and no power to increase, the powers of this court as defined by the Constitution,—and that an attempt to do so may be disregarded by that court,—without at all being bound to concede that the Judiciary has a general right to declare invalid any law of the Legislature repugnant to the Constitution. And certainly no one would have a right to criticize a court if, in a case of an increase of its powers by the Legislature beyond the powers granted to it by the Constitution, the court should refuse to make use of such additional powers. And that is all that the court actually did in Marbury v. Madison.

As we consider this point of very great importance we shall illustrate it further by taking an analogy from another department of government. The President of the United States does not now claim the right to disregard or to declare invalid any

act of Congress which he deems repugnant to the United States Constitution. Certainly not after such act has been approved as constitutional by the Judiciary. Nevertheless, if Congress should, for example, pass a law that the President shall have the right not only to call for reports from the heads of departments, as provided by the Constitution, but also to call upon the Vice-President for a report of the transactions of the Senate, the President would have a perfect right to say that he would disregard such a law as unconstitutional, even though its constitutionality has been approved by the Judiciary. And his taking that position would not be equivalent to the claim of a general right to disregard laws of Congress for alleged repugnancy to the Constitution. He could say, and with very good reason, that there is a vital distinction between the right of Congress to pass laws generally, and to pass laws affecting his department. For passing general laws is the particular function entrusted to the Legislature by the Constitution itself, while the regulation of the Executive Department has been entrusted to the President, under certain limitations in the Constitution particularly described. His rights, therefore, as given by the Constitution can neither be diminished nor increased. Since he is a co-ordinate branch of the Government, he takes his powers directly from the Constitution, and has therefore a right to disregard any intermeddling by the Legislature with his department not warranted by the Constitution. And, a fortiori, he could not be criticized if he merely declared that in view of the fact that Congress had intended only to confer upon him an additional right or power, he did not intend to make use of the right or power thus conferred in view of his opinion as to the provisions of the Constitution.

And that is all that the decision in Marbury v. Madison amounted to. And that is why Jefferson and his followers found no fault with the decision, but only with the opinion. They could not very well find fault with the decision, for, as we shall see later, the decision as such did absolutely nothing that was contrary to the constitutional theory of Thomas Jefferson himself, even on Marshall's own reasoning as far as the ratio decidendi of the case is concerned.

As we have already seen, and as we shall see again further below, under the Madison-Jefferson theory, each department of the government had a right to construe the Constitution independ-

ently of any other department in so far as its own action was concerned. It certainly would not occur either to Madison or to Jefferson to blame the Judicial Department for refusing to take or exercise a power of the constitutionality of which it was itself in doubt. Far, therefore, from its being surprising that the Republicans did not attack this decision, it would have been more surprising, indeed astonishing, if they had attacked this decision as such.

The attitude of the Jeffersonians towards the decision in Marbury v. Madison was best expressed by Nathaniel Macon, one of the influential leaders of the Republican party, quoted by Mr. Warren in his Supreme Court, that the reasoning and the decision in Marbury v. Madison put him in mind of a noted member of Congress "who always spoke on one side and voted on the other." Clearly, whatever they might say about the speaking in this case, they certainly had no complaint to make against the voting, including the voting that the Supreme Court had not, or would not exercise, the power to issue a writ of mandamus in an original proceeding; and that quite aside from the fact that the Republicans probably took the position that Congress never intended by the act in question to give the Supreme Court any such power. That there was nothing in the actual decision of Marbury v. Madison which in any way militated against the Jeffersonian theory of the Constitution, and that therefore fault could be found only with the opinion, was expressly stated by Jefferson about eighteen months after the decision in that case, when he wrote to Mr. Adams:

"Nothing in the Constitution has given them (the Supreme Court) a right to decide for the Executive, more than to the Executive to decide for them.

"The opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislature & Executive also in their spheres, would make the judiciary a despotic branch."

Some apologists for the Judicial Power have attempted to draw the conclusion, from the lack of criticism by Jefferson and his followers of the decision in Marbury v. Madison, and from expressions of Jefferson similar to the one quoted above, that Jefferson and his followers were themselves in favor of the Judicial Power. As a matter of fact, the only thing that this conduct of the Republicans and their expressed views prove, is that nothing

had been decided in Marbury v. Madison that in any way countenanced the Judicial Power as we know it today. Of course, considerably more than was decided, was said in the opinion accompanying the decision. But that received all the criticism that was to be expected under the circumstances, and it got considerably more later on when it was realized that in this connection the opinion may count for more than the decision itself.

CHAPTER XI

FROM THE REVOLUTION OF 1800 TO THE WAR OF 1812

HE tendency noted by Mr. Warren, to regard historic events from our own point of view in judging the attitude of their contemporaries towards them, has played havor with the decision in Marbury v. Madison in more ways than one. One of its consequences is to regard this decision not only as a "landmark so high," but also as a chasm so deep in American history, or at least in American judicial history, as to definitely divide the history of the Judiciary in this country into two sections: the chaotic pre-Marbury days; and the orderly post-Marbury era, illumined by the clear and undimmed light of the opinion in Marbury v. Madison. In the pre-Marbury days, the question of Judicial Power was unsettled—but the Marbury decision settled it once and for all.

Another result of this way of projecting ourselves backwards into the past, is the habit of regarding the decision in Marbury v. Madison as an isolated fact, associated only with the appointment of John Marshall as Chief Justice, and disconnected from anything else that preceded or accompanied it. It was the great brain of John Marshall that produced this marvelous piece of logical exposition of the Constitution, which forms the rock upon which the Judicial Power in this country is built. Or, again, it was Marshall's great courage that put the thought of his generation on this subject into the form of a judicial decision. This, as we have seen, is the opinion of Mr. Beveridge, who believes that there was nothing novel in the opinion in Marbury v. Madison, in so far as it expressed an abstract theory, except, perhaps, the form.

Of late, a more critical examination of the history of that period has led many to recognize the fact that Marshall's opinion in *Marbury v. Madison* did not spring suddenly, like Minerva, fully panoplied, from the brow of Jove. And both the scholarly historian of the United States Supreme Court and Marshall's own

famous biographer recognize the connection between the decision in *Marbury v. Madison* and the *political* history of the times, as may be seen from passages from their works quoted above. This is particularly true of Senator Beveridge, whose account of the events which led up to the decision and of the motives which impelled Marshall to make it, has been quoted above at some length.

Nevertheless, both of these scholarly writers cannot divest themselves of the present-day importances of that famous decision when discussing the relations and reactions of its contemporaries to it.

Hence the extravagant rhetoric of Senator Beveridge, and the equally extravagant, though less rhetorical, estimate of Mr. Warren. In reality, the decision in Marbury v. Madison can be understood only when taken in connection with all of the surrounding facts and the entire political situation of the time. And when so examined, it will be found to have been an event of comparatively little significance, notwithstanding the importance of the case up to the time of its decision. In fact, it will be found that not only was the major portion of the opinion nothing but a political pamphlet, a campaign document in the then pending struggle between the Federalists and Anti-Federalists; but that that portion of it which laid down the theory of Judicial Power was in the nature of a rear-guard action intended to cover the retreat of the Judiciary before its enemies.

We have already noted the fact that by the time of the "Revolution of 1800" the Judiciary came to be regarded by both Federalists and Anti-Federalists as a purely partisan institution—a Federalist party institution. And also, that having been routed in the election of 1800, the Federalists decided to retreat into the Judiciary Department, and entrench themselves there; in the hope, presumably, of being able to so weather the storm. That was the frankly avowed purpose of the reorganization of the Judicial Department in the last days of the Adams Administration. A small detail is interesting in this connection. When the Supreme Court was first organized under the original Judiciary Law of 1789 that court consisted of six judges. The new bill provided that when the first vacancy shall have occurred it should not be filled, but that the court should thereafter consist of only five judges. It was understood that the purpose of this bill was

to deprive Jefferson of the opportunity of nominating a successor to Judge Cushing, whose death or retirement because of illness was expected in the near future. Evidently the framers of the bill thought their defeat in the election of 1800 a temporary affair, and hoped that by depriving Jefferson of the opportunity of nominating a judge of the Supreme Court during the four years of his presidential term, they could keep the solid front of the Federalist Supreme Court intact without a Republican rift. And the entire Judiciary Reorganization Bill was evidently constructed from that point of view: To provide a safe haven for Federalism during the stormy days of the Revolution; and a point of vantage from which to make an assault upon their enemies after the worst of the storm was over.

That it should have been regarded from the same point of view by the Anti-Federalist was only natural; and this fact could not have been overlooked by the leaders of the Federalists, who engineered this legislation. It would seem therefore, at first glance, that the entire scheme was a futile one, since it should have been expected that the Anti-Federalists upon coming into power would attempt to overturn this legislation. But this view fails to take into account the views of the Federalist leaders as to the constitutional question involved in this legislation and any attempts to repeal it. The U.S. Constitution provides that Federal judges should serve for life, and that their pay could not be diminished during their term of office. It was the unanimous opinion of the Federalist leaders that under these provisions of the Constitution the repeal of their Judiciary Reorganization Acts would be impossible. It was their settled conviction that once the new judges were appointed under the new legislation these judges could not possibly be turned out of office without a violation of an express provision of the Constitution. And they were fully confident that the Federal judges themselves could prevent a repeal of this legislation by declaring the repealing act unconstitutional and then refusing to abide by any Repeal Law should one be enacted.

It was probably on this account, in order to have a unanimous opinion of the Supreme Court on this point, that they were anxious that all of the Judges of the Supreme Court should be Federalists. This would account for the peculiar provision with reference to the next vacancy on large political grounds, rather than by a

petty desire to annoy Jefferson, as has been assumed by most historians.

But the Federalists had evidently underestimated the power and daring of their opponents. For no sooner did the new Republican Congress assemble than measures were taken to repeal the great Judiciary Reorganization scheme upon which the Federalists had laid such great hopes. The debate upon these Repeal Bills was one of the greatest ever held in the United States Congress, and one of the most interesting. But the debate was not confined to the Halls of Congress. It was carried on throughout the length and breadth of the land, in the public press and in private correspondence. All kinds of arguments were used, from mere arguments against the constitutionality of the proposed legislation, to threats of having the laws actually declared unconstitutional by the Judiciary, and to secession by the New England states in the event of their passage.

Both sides, however, were equally determined; and the Republicans answered the threat of having the laws declared unconstitutional by the counter-threat of having all the Federalist judges, including the Judges of the Supreme Court, impeached if they did so. And neither side was indulging in mere empty threats. At least up to the point of secession. The Federalists had no doubt that the Supreme Court would declare the Repeal Act unconstitutional, and the Republicans fully intended to impeach the judges who did so. For the Federalists had no doubt of the unconstitutionality of the Repeal Act, and the Anti-Federalists had no doubt of the fact that the Judiciary had no right to declare a law unconstitutional. For the question was not, then, conceived as one of interpreting the Constitution, but as one of making it, in the same manner as the "constitution" is made in England, for instance.

It was natural that in such a debate the entire theory of Government and the place of the Judiciary within it should be discussed from every angle. The arguments for and against democracy, and for and against the Judicial Power, the nature of Constitutional Government and the question of Supreme Authority within it, were therefore gone over again and again.

Gouverneur Morris, now United States Senator from New York, declared in the Senate: "Governments are made to provide against the follies and vices of men. . . . Hence, checks are re-

quired in the distribution of power among those who are to exercise it for the benefit of the people." The most efficient of these checks was the power given the National Judiciary—"a check of the first necessity, to prevent an invasion of the Constitution by unconstitutional laws—a check which might prevent any faction from intimidating or annihilating the tribunals themselves."

To this Senator Mason of Virginia replied that under the Constitution, the Judiciary had no constitutional authority to "control the other departments of the Government"; and that since government is instituted for the good of the people the Judiciary ought not to be independent of the people themselves, which it would be if it had the ultimate power to dictate to both Legislature and Executive as to the meaning of the Constitution.

Senator Breckinridge of Kentucky, who was one of the prin-

cipal leaders in this debate, said:

"I did not expect, Sir, to find the doctrine of the power of the courts to annul the laws of Congress, as unconstitutional, so seriously insisted on . . . I would ask where they got that power, and who checks the courts when they violate the constitution? . . . Is it not extraordinary, that if this high power was intended, it should no where appear? . . .

"Never were such high and transcendent powers in any government (much less in one like ours, composed of powers specially given and defined) claimed or exercised by construction only. . . :

"To make the constitution a practical system, this pretended power of the courts to annul the laws of Congress cannot possibly exist. My idea of the subject, in a few words, is, that the constitution intended a separation of the powers vested in the three great departments, giving to each exclusive authority on the subjects committed to it.... That those who made the laws are presumed to have an equal attachment to, and interest in the constitution; are equally bound by oath to support it, and have

an equal right to give a construction to it.

"That therefore the legislature have the exclusive right to interpret the constitution, in what regards the law-making power, and the judges are bound to execute the laws they make. For the legislature would have at least an equal right to annul the decisions of the courts, founded on their construction. . . . of the constitution, as the courts would have to annul the acts of the legislature, founded on their construction. . . . I ask then, if gentlemen are prepared to admit, that in case the courts were to declare your revenue, impost and appropriation laws unconstitutional, that they would thereby be blotted out of your statute book, and the operations of your government be arrested? . . . Let gentlemen

consider well before they insist on a power in the judiciary which places the legislature at their feet."

In the House of Representatives the debate took a similar course. James A. Bayard, the Federalist leader of the House, led the debate on the Federalist side. According to Senator Beveridge, Bayard—"Again and again, restated, and with power and eloquence, all the arguments to support the supervisory power of courts over legislation. At last he threatened armed resistance if the Republicans dared to carry out their plans against the National Judiciary. There are many now willing to spill their blood to defend that Constitution. Are gentlemen disposed to risk the consequences?' Destroy the independence of the National Judiciary and 'the moment is not far when this fair country is to be desolated by civil war.'" (Beveridge, Marshall, III, p. 82)

The speech of the Federalist leader of the House was replied to by the leader of the Republicans, the famous John Randolph of Roanoke. Giving the official theory of the Republican party, he declared that the proper restraint upon Congress was not to be found in the pretended power of the Judiciary to veto legislation, but in the people themselves, who at the ballot box could "apply the Constitutional corrective." "That is the true check—said he—every other is at variance with the principle that a free

¹This debate illustrates the great care with which contemporary expressions of opinion must be scrutinized, and the great danger which lurks in deductions made from stray expressions. Note, first, that there were evidently three different positions taken in the debate—all supposed to be based on the theory of the division of powers:

⁽¹⁾ The extreme Federalist position that the courts are the special interpreters of the Constitution. But not all the Federalists seem to have held to it. It may be noted in this connection that there is nothing in Marshall's opinion in Marbury v. Madison to show that he ever held to it.

⁽²⁾ The position that each department has a right to decide for itself as to the meaning of the Constitution—the decision of each within its own sphere being final. This was held by what might be called the "centre," composed of moderate Federalists and moderate Republicans.

⁽³⁾ The extreme Republican position that, the making of laws being the particular function of the Legislature, the judges are bound to enforce all laws. And even here two shades of opinion must be distinguished, for there were undoubtedly some among those who participated in the debate who would distinguish between general laws and laws affecting the powers of a co-ordinate department of government—such laws, for instance, as were involved in Marbury v. Madison—although this distinction may not have been made clear in this debate.

There is some ground for the belief that Madison and Jefferson held to the extreme Republican view. Or, rather, that their views developed from the moderate to this extreme Republican position. It is interesting to note also that but for the last paragraph, one would have assumed that Breckenridge held to the second or moderate view; whereas he, in reality, held to the third, or extreme Republican view. It is clear that Randolph and the majority of Republicans held to this last view. (Debates in the Congress of the United States, Albany, 1802, pp. 236-239)

people are capable of self government." And referring to the threat that if the Repeal Bill were passed it would be declared unconstitutional by the Supreme Court, he said:

"But, Sir, if you pass the law, the judges are to put their veto upon it by declaring it unconstitutional. Here is a new power of a dangerous and uncontrollable nature contended for. The decision of a constitutional question must rest somewhere. Shall it be confided to men immediately responsible to the people, or to those who are irresponsible? . . . From whom is a corrupt decision most to be feared? . . . The power which has the right of passing, without appeal, on the validity of your laws, is your sovereign. . . . Are we not as deeply interested in the true exposition of the constitution as the judges can be? Is not Congress as capable of forming a correct opinion as they are? Are not its members acting under a responsibility to public opinion, which can and will check their aberrations from duty?"

And referring to the claim that the judges are the proper protectors of the people against unjust laws, he pointed out that the Federal judges had failed to protect the people when the Federalist Congress had passed unconstitutional laws, and had generally shown themselves the willing tools of tyranny. And then he added, in words which now sound almost prophetic:

"No, Sir, you may invade the press; the courts will support you, will outstrip you in zeal to further this great object; your citizens may be imprisoned and amerced; the courts will take care to see it executed; the helpless foreigner may, contrary to the express letter of your constitution, be deprived of compulsory process for obtaining witnesses in his defence; the courts, in their extreme humility, cannot find authority for granting it."

He wound up his argument by declaring that if the rights of the courts to declare acts of Congress unconstitutional be admitted, Congress itself would be reduced to a debating society:

"For the amusement of the public, we shall retain the right of debating but not of voting."

Referring to this debate, Senator Beveridge says in his Life of John Marshall:

"All the reasons for the opinion which John Marshall, exactly one year later, pronounced in *Marbury v. Madison* were given during this debate. Indeed, the legislative struggle now in progress and the result of it, created conditions which forced Marshall to execute that judicial coup d'état."

The "result" of this legislative struggle was the Repeal Act, which undid the entire work of the Federalists in their Judiciary Reorganization scheme, by abolishing the new Circuit Courts created by the Circuit Court Bill, and sending the judges of the Supreme Court back to circuit duty. In addition, the Republicans passed a measure which had the effect of abolishing the sessions of the Supreme Court for eighteen months. It is claimed that this was done in fear that if the intervening terms of the Supreme Court were not abolished, the Supreme Court would probably declare the Repeal Act unconstitutional at its very next term and the Republicans wanted time to take proper measures against such an eventuality. Whether or not that was the actual intention, there can be no doubt that between the passage of the Repeal Act in March, 1802, and the next term of the Supreme Court in February, 1803, the Federalist forces became thoroughly demoralized and the Judiciary beat a hasty retreat. Marshall was therefore compelled to be satisfied with a paper coup d'état instead of a real one. In fact, if the decision in Marbury v. Madison be properly appraised as to its meaning when made, it was more like a proclamation of a pretender to the throne than like a coup d'état. Although, when, eventually, there was a Restoration of the Judiciary, or, rather, a real accession to power for the first time after another Revolution, it officially dated its reign from the formal proclamation of its pretensions, as is quite usual in such cases: Officially Charles II reigned during the entire period of the Commonwealth, and Louis XVII is supposed to have reigned while Napoleon was Emperor of France.

For the time being, however, the decisiveness of the defeat inflicted upon the Federalists by the Revolution of 1800, and their complete demoralization as a consequence of that defeat, was not as yet fully realized. Most of the leaders expected that the Judiciary, with Marshall at its head, would rally the beaten host, and make a last stand in the Supreme Court by declaring the Repeal Laws unconstitutional. Marshall, at least, was fully equal to the emergency, and was ready to declare the Repeal Laws unconstitutional and take the consequences. But the other judges of the Supreme Court thought discretion the better part of valor, and refused to follow the intrepid leader—at least, that is the view of Marshall's distinguished biographer.

In discussing this episode of our history Mr. Beveridge says:

"When the Republicans repealed the Federalist Judiciary Act of 1801, Marshall had actually proposed to his associates upon the Supreme Bench that they refuse to sit as circuit judges, and 'risk the consequences.' By the Constitution, he said, they were Judges of the Supreme Court only; their commissions proved that they were appointed solely to those offices; the section requiring them to sit in inferior courts was unconstitutional. The other members of the Supreme Court, however, had not the courage to adopt the heroic course Marshall recommended. They agreed that his views were sound, but insisted that, because the Ellsworth Judiciary Act had been acquiesced in since the adoption of the Constitution, the validity of that act must now be considered as established. So Marshall reluctantly abandoned his bold plan, and in the autumn of 1802 held court at Richmond as circuit judge. To the end of his life, however, he held firmly to the opinion that in so far as the Republican Judiciary Repeal Act of 1802 deprived National judges of their offices and salaries, that legislation was unconstitutional."

But this tells only half the story, and the least important half at that. Although what it tells is very interesting in itself. And for two reasons: If what Mr. Beveridge says is true as to the opinions of the other judges, it constitutes a very serious indictment against all the Associate Judges of the Supreme Court at that time, who preferred to carry out an unconstitutional law rather than "risk the consequences." But the question goes deeper than the mere question of the courage of the particular judges. It is a matter affecting the whole problem of the Judicial Power, since the entire argument in favor of giving judges the right to declare laws unconstitutional is based on the assumption that they are a superior breed of men who are never afraid of "risking the consequences" in the performance of their duty.

Nor is the indictment only against Marshall's associates; it is, in fact, against Marshall himself. For, surely—there was nothing to prevent Marshall from setting the example of refusing to execute an unconstitutional law, and risking the consequences for himself. Or, is it possible that Marshall's boasted courage went only to the extent of issuing paper manifestoes? Such is the opinion at least of one historian on the subject, who is otherwise a great admirer of Marshall as the founder of the Judicial Power. And a careful examination of the entire situation not only sustains that view, but irresistibly leads to the conclusion that the paper manifesto issued by Marshall in Marbury v. Madison was

itself partly a design to cover the retreat of the Judiciary and partly intended to give the retreating Judiciary encouragement, to help them keep up their spirits in time of defeat. It was, in fact, the manifesto of a deposed king in full flight announcing that, notwithstanding the flight, he is still the ruler of his kingdom.

The repeal legislation in question consisted of two parts: It abolished the new Circuit Courts created by the Federalist legislation of 1801, and it restored the Circuit Court duty of the Supreme Court Judges contained in the Ellsworth Judiciary Act of 1789, which had been abolished by the Judiciary Reorganization Act of 1801. It is the latter part only that was involved in the discussion of the judges as to whether they should hold court under the new Republican legislation, and it is only as to this part of that legislation that Marshall's associates had the excuse that it had been acquiesced in since the court was first organized and should therefore not be questioned now. Also, these same associates of Marshall's evidently had no objection to declaring Section 13 of the Ellsworth Judiciary Act unconstitutional in Marbury v. Madison. It evidently made a difference to Marshall's associates on the Supreme Bench whether the declaration led to a decision that would be acceptable to the Republicans or one that would be considered by them as rebellion; and that Marshall himself was evidently affected by these considerations.

All of this clearly had no reference whatever to that part of the repeal legislation of the Republicans which abolished the Circuit Courts, and it is that part of it which drew the fire of the Federalists in discussing the unconstitutionality of the repeal legislation. That part of the Repeal legislation was incomparably the more important, and it is that part of it which was undoubtedly unconstitutional, if any part of it was so. And it is that part of it which is referred to in Mr. Beveridge's last sentence, when he says that Marshall "to the end of his life" held the Republican legislation of 1802 to be unconstitutional.

And there was certainly nothing in the way of "acquiescence" which could have stood in the way of the Supreme Court declaring that part of the Repeal legislation of 1802 unconstitutional. Why, then, was this law never declared unconstitutional?

The historians of the Judicial Power usually gloss over this painful episode in the history of our Judiciary in silence, or dispose of it by some vague and meaningless phrase. All but one—

who will be considered later. Mr. Beveridge, after having assured us of Marshall's personal courage, and after putting the blame upon the other judges, proceeds to explain why nothing was done about that part of the repeal legislation of 1802 which was not involved in the Associates' excuse:

"Had the circuit judges, whose offices had just been taken from them, resisted in the courts, Marshall might, and probably would, have seized upon the issue thus presented to declare invalid the act by which the Republicans had overturned the new Federalist Judiciary system. Just this, as we have seen, the Republicans had expected him to do, and therefore had so changed the sessions of the Supreme Court that it could not render any decision for more than a year after the new Federalist courts were abolished.

"Certain of the deposed National judges had, indeed, taken steps to bring the 'revolutionary' Republican measure before the Supreme Court, but their energies flagged, their hearts failed, and their only action was a futile and foolish protest to the very Congress that had wrested their judicial seats from under them. Marshall was thus deprived of that opportunity at the only time

he could have availed himself of it."

Again somebody else's courage had failed. But why should it have, with the great leader there, ready for the fray, and undoubtedly ready for giving the signal of battle, if on battle bent? As a matter of fact, the statement contained in Mr. Beveridge's last sentence is nothing less than a perversion of historic facts. Not only was Marshall not deprived of the opportunity to declare the Repeal Act unconstitutional "at the only time he could have availed himself of it," but as a matter of fact, the opportunity had been shoved right under his nose and he deliberately shoved it aside. That opportunity was given to Marshall and the entire Supreme Court in the case of Stuart v. Laird, which was decided by the Supreme Court within a week of Marbury v. Madison.

Stuart v. Laird was tried originally at circuit before Marshall himself, and came up to the Supreme Court on an appeal from his decision. In the Supreme Court, the opinion was given by Judge Paterson, Marshall himself refraining from giving any opinion because he had sat in the case in the court below. But the Supreme Court only affirmed Marshall's own decision given in the lower court; and we must assume that he was satisfied also with the opinion given by the Supreme Court in affirming his de-

cision. Had he been dissatisfied he would not have hesitated to give his dissenting views, as did Judge Paterson, when his decision was reversed in Ware v. Hylton.

We have no record of the arguments as presented in the court below; nor of the opinion of the court, if any was given. But we do know that in the opinion of the eminent counsel who argued the case in the Supreme Court the entire scope of the Republican Repeal legislation was involved. The case was argued in the Supreme Court by Charles Lee, who had been Attorney-General under Adams—the same Lee who was counsel for the plaintiff in the Marbury case, and who did not raise the question of unconstitutionality in that case. But in this case he based his principal point on the alleged unconstitutionality of the repeal legislation, particularly that part of it which abolished the Circuit Courts, on which he dwelt at great length.

What did Marshall and the Supreme Court do with this great opportunity? The Supreme Court refused to take the opportunity, and deliberately evaded the issue thus squarely presented to it.

And it did this in the most ignominious way possible: It simply ignored Lee's major argument,—the unconstitutionality of that portion of the repeal legislation which abolished the new Circuit Courts. Pretending, then, that Mr. Lee's argument was directed only to that part of the repeal legislation which put Circuit Court duty upon the Supreme Court Judges, which that legislation had in common with the old Ellsworth Judiciary Act, the Supreme Court proceeded to declare that:

"To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed."

And so the great unconstitutional and "revolutionary" legislation of the Republican Congress of 1802, which according to the leading Federalist lawyers ripped the very foundations from under the Constitution, became constitutional. But not by default, as

Mr. Beveridge would have us believe, but by the affirmative actions of Marshall and his associates.

This incident has been discussed here at length primarily because it puts Marbury v. Madison in its true place as a historical incident, and proves conclusively that that famous opinion was intended to be, as it actually was, a mere paper declaration. But Stuart v. Laird is also interesting in itself as a commentary upon our constitutional system. Evidently we may still live under unconstitutional laws, notwithstanding the guardianship of the Judiciary. An unconstitutional law may become constitutional by default, or because the judges have not the courage to declare it unconstitutional. And this even with such able and courageous judges as Marshall on the Bench.

A law may also become constitutional by prescription, as was the Ellsworth Judiciary Law according to the decision in Stuart v. Laird. The judges acted under it for a number of years, either through wilfulness or ignorance. They either knew it was unconstitutional and wilfully ignored that fact. Or they did not know about it—such a thing evidently being quite possible under our system. But whether they acted from ignorance or wilfulness, their action became binding upon their successors—the law having become constitutional by lapse of time. In view of what Mr. Beveridge tells us as to the real opinion of the judges on this point, their official excuse about the "contemporary interpretation of the most forcible nature" is mere camouflage. Evidently this contemporary interpretation was not of a sufficiently forcible nature to influence the actual opinion of the judges. For Mr. Beveridge assures us that, notwithstanding this alleged "contemporary interpretation," the judges really believed the law to be unconstitutional, and Marshall actually favored their refusal to act under it because of its alleged unconstitutionality. The actual decision in Stuart v. Laird was therefore either sheer pretense born of cowardice; or it means that the judges believed that, notwithstanding their own opinion as to its unconstitutionality, the law had actually become constitutional by lapse of time or "prescription."

Now, this may fit in with other theories of the Judicial Power. With that of Madison, for instance; as we shall have occasion to see later. It certainly does not fit in with Marshall's theory,

announced only the week before—with the concurrence of the entire court—that an unconstitutional law is absolutely void.

By refusing Mr. Marbury his mandamus against Madison, and by refusing to declare unconstitutional the Repeal Act whereby the Republicans abolished the United States Circuit Court, the Supreme Court Judges saved themselves from impeachment. But that was not the end of the struggle. While the judges were in full retreat, they were doing considerable backfiring which was very irritating to Jefferson and the other Republican leaders. There were, for instance, the pretensions of Marshall and his associates as stated in the opinion in Marbury v. Madison. Jefferson and his associates in the leadership of the Republican party therefore decided to take retaliatory measures against the judges whenever their conduct warranted it. Some of the judges evidently did not know they were beaten; or at least did not understand the consequences of being beaten—with the result that a number of them were actually impeached. The most important of the impeachment proceedings was that against Associate Justice Chase of the United States Supreme Court—the only instance in the history of the country of a member of the United States Supreme Court being impeached.

The impeachment of Judge Chase is important, however, not only because of the fact that he was a member of the Supreme Court, but because it had a bearing on the Jeffersonian theory of the Constitution-which, as we have already stated, was the accepted theory of the Republican party, including such men as James Madison, the Father of the Constitution. Before proceeding to a discussion of the impeachment proceedings against Chase, we shall, therefore, take this opportunity to refer to an action and quote a statement made by Jefferson, while President of the United States, which most clearly illustrate this theory of the Constitution. The action was taken while the impeachment proceedings against Chase were being prepared, that is, during the year 1804, and consisted of a pardon of some persons who were still serving sentences for conviction under the Sedition Law. The pardon itself was not important as a political event, as Jefferson's opposition to the Sedition Law and the prosecutions thereunder were well known. But the reasons given for these pardons are of the greatest importance in our connection, as they could not possibly be given by any President after the establishment of the

Judicial Power. In a letter to Mrs. John Adams, dated September 11th, 1804, Jefferson said, referring to these pardons:

"The Judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution. The instrument meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the Judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislative and Executive also in their spheres, would make the Judiciary a despotic branch."

As we have already stated, it is because of this conception of the Constitution that Jefferson did not and could not criticize the decision in Marbury v. Madison; not even that portion of it whereby the court considered itself powerless to issue a writ of mandamus, even though in so doing they asserted the right to disregard an Act of Congress which they believed had placed that power in their hands. And it is because of this conception of the Constitution that Jefferson was bound to and did condemn the opinion in Marbury v. Madison, if, and in so far as, the court presumed to declare the meaning of the Constitution either to the Legislature or to the Executive.

This conception of the Constitution, while sound theoretically, had one practical defect—the defect pointed out by Madison in 1788—namely, that in most cases it left the Judiciary the masters of the situation, even if they kept strictly within their own sphere; for most laws provide for justiciary matters, and in such matters the construction of the judges is the final construction. And since the judges are appointed for life, and are not responsible to the people, this was a serious blemish from the Madison-Jeffersonian point of view. Hence Madison's complaint against those who did not see the wisdom of his plan for a Council of Revision, which was evidently intended to be a substitute for the right of the judges to declare laws unconstitutional even for themselves. But Jefferson and the other Republican leaders did not think that the Constitution left the judges utterly irresponsible. For while the judges were not responsible to the people directly, Jefferson and his associates believed that they were made responsible to the people indirectly through the process of impeachment which had been placed in the hands of Congress. It was the Jeffersonian theory that impeachment was not a criminal proceeding designed to punish judges who committed crimes and misdemeanors, since judges and other public officers were amenable to the ordinary processes of the law. Impeachment, they believed, was a political corrective against judges and other public officers who deliberately and persistently misconstrued either the Constitution or the laws, or otherwise abused or misused the powers granted them by the Constitution. In other words, they believed that impeachment was a method of removal for political offenses, placed by the Constitution in the hands of the representatives of the people over all officers of the government, including judges, to be used against them when their behavior became obnoxious to the community. In order that this process should not be used for partisan purposes or on slight provocation, the procedure was hedged about with many difficulties: The proceedings must initiated by the House of Representatives, while the trial is to be by the Senate, and a two-thirds majority is required for conviction and removal. But it is, nevertheless, in its essence a political proceeding, designed primarily to rid the public service of faithless servants of the people. In order to be amenable to the process of impeachment the act charged need not, therefore, be such as to involve either the violation of a statute or moral turpitude. The deliberate assumption of powers not granted by the Constitution, if persisted in, would be an impeachable offense under this theory, even if done with the best intention and in full belief that the conduct was authorized by the Constitution.

Of course, mere opinion as to where the Constitution lodged a certain power could not be considered an impeachable offense. Hence, the opinion in Marbury v. Madison was not an impeachable offense. But a refusal to execute the Repeal Laws for alleged unconstitutionality would have been,—or at least might have been.

That, however, did not mean that no statement made by a judge could possibly be ground for impeachment. Quite the contrary. If the statement were such that it amounted to a political act it might be ground for impeachment. It was just such action on the part of Judge Chase that gave rise to the impeachment proceedings against him. Judge Chase seems to have been a

rather peculiar individual—given to frequent changes of views, and to even more frequent outbursts of ill-temper. We have already seen the rather queer recommendation which Washington's friend McHenry gave him when he asked Washington to appoint Chase to a post on the Federal Bench. That letter of recommendation indicated that Mr. Chase's career up to his appointment to the Supreme Court had been a somewhat unsteady one, to say the least. And his career as a judge on the Supreme Bench proved that his errors and infirmities were not all in the past. As to his personal character, we may cite the opinion of District Judge Peters, who said that of all the judges with whom he had to sit he disliked most to sit with Mr. Justice Chase, because of his frequent outbursts of ill-temper.

From the point of view of the Bar these outbursts must have been considered even more serious, since it was the Bar that suffered most from them. Chase was therefore cordially disliked by the lawyers who practiced before him. But the worst of all his offenses was his intense partisanship, which made him forget the dignity of his position as well as the rights of attorneys and litigants before him. It was only natural that he should be one of the most rabid enforcers of the Sedition Law; and it was his conduct during prosecutions under that law that gave most offense. From that time he was a marked man with the Republicans. It is doubtful, however, whether they would have attempted to impeach him for offenses committed before they came into power, if he had not given fresh offense by his conduct while they were in power.

It is interesting in this connection to note the evolution of Mr. Justice Chase's views on the subject of the Judicial Power. Our readers will recall his repeated expressions of doubt as to the existence of the power in the Federal Judiciary to declare a law of Congress unconstitutional; and his repeated assurances that if such a power did exist he would not exercise it except in a very clear case. But doubts and assurances, notwithstanding, he joined with Marshall in the decision of Marbury v. Madison, which declared unconstitutional Section 13 of the Ellsworth Judiciary Law under circumstances which throw doubts even on Marshall's bona fides in his declaration that it was unconstitutional. But Mr. Justice Chase could not have had even a doubt as to its constitutionality, for the reasons so ably explained by Marshall's bi-

ographer, and which are evident to any one who has examined that case with any degree of care. But not only did Chase join Marshall in declaring a law unconstitutional on the flimsiest grounds imaginable; he was the only one of Marshall's associates who was willing to declare the Repeal Legislation of 1802 unconstitutional, because it imposed Circuit Court duties on the judges of the Supreme Court. This despite the fact that he himself had for years held Circuit Courts under the Ellsworth Judiciary Act, never for a moment doubting the constitutionality of that law.

It should be remembered that this is the law which the Supreme Court expressly declared constitutional in Stuart v. Laird only a week after the decision in Marbury v. Madison. In that case the Supreme Court dismissed the entire argument against the constitutionality of the law imposing circuit duty upon Supreme Court Judges almost with a shrug of the shoulders and an "of course"; and Mr. Justice Chase joined in that decision. But before it was decided to declare the law constitutional, as a matter "of course," Chase was convinced that it was unconstitutional, and expressed his earnest hope that the other judges would agree with him and refuse to hold circuits.

As to his courage, it is sufficient to say that he was willing to stand by his convictions only if the other judges did likewise. So that his joining in the decision of Stuart v. Laird was evidently due not to any convincing arguments presented on the other side, but to his declining to take the risk of acting single-handed on his own convictions. In his reply to Marshall's request of his associates for an expression of their views on the subject, Chase, after giving his views as outlined above, added:

"The burthen of deciding so momentous a question, and under the present circumstances of our country, would be very great on all the Judges assembled, but an individual Judge, declining to take a Circuit, must sink under it. I believe a day of severe trial is fast approaching for the friends of the Constitution; and we, I fear, must be the principal actors, and may be sufferers, therein."

But evidently, he was willing to be the sufferer only if his associates, at least, would be in the same boat. Alone, he absolutely refused to "sink" for the Constitution.

Having bowed to the storm to the extent of performing Circuit Court duty under the Repeal Law and formally holding that law constitutional, Chase evidently thought it safe enough to indulge

himself in one of his political harangues in the form of a charge to a grand jury. So about two months after the decision in Stuart v. Laird, he took occasion to deliver a long political charge to a grand jury in Baltimore, in which he expressed his views on the state of the country in general and on certain State and Federal legislation in particular. In this charge he attacked the Repeal Legislation, which he did not dare to pronounce unconstitutional, when called upon to act upon it, as destroying "the independence of the National Judiciary." He also attacked the new State Constitution of Maryland, particularly because it contained a provision for manhood suffrage, which he said would:—"certainly and rapidly destroy all protection to property and all security to personal liberty, and our republican Constitution will sink into a mobocracy."

For this terrible thing, the introduction of manhood suffrage, Jefferson and the Republicans were held responsible.

"The modern doctrines—said Mr. Justice Chase—by our late reformers, that all men in a state of society are entitled to enjoy equal liberty and equal rights, have brought this mighty mischief upon us, and I fear that it will rapidly destroy progress, until peace and order, freedom and property shall be destroyed."

On January 6th, 1804, the House of Representatives appointed a committee "to enquire into the judicial conduct of Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, and to report their opinion whether the said Samuel Chase hath so acted in his judicial capacity as to require the interposition of the constitutional power of the House."

A year later the House of Representatives voted to impeach Judge Chase, and named a Committee of Managers to conduct the trial, headed by John Randolph of Roanoke. The committee prepared articles of impeachment containing eight counts. In speaking of the grounds of Judge Chase's impeachment, Mr. Warren, in his Supreme Court, says:

"The acts for which he was now to be impeached certainly did not arise out of corrupt or improper motives; neither were they intentionally arbitrary or illegal; nor were they 'prompted by a spirit of persecution and injustice' as charged; but they were undoubtedly such acts as a calm and scrupulous Judge would not have committed. It is unnecessary to recite them in detail. In general, they consisted of legal rulings and course of conduct to-

wards the defendants and their attorneys in the trials of John Fries and James Callender in 1800; of his unsuccessful attempt to secure an indictment under the Sedition Law in Delaware; and of his charge to the grand jury in Baltimore in 1803. Of all of these, the last only would, in calmer days, have been deemed a ground of impeachment."

The impeachment trial opened on February 4th, 1805, Judge Chase appearing by five of the most famous lawyers of the day; three of them, at least, famous political lawyers—Luther Martin, Robert G. Harper, and Charles Lee, of Marbury v. Madison and Stuart v. Laird.

The trial lasted nearly a month, the vote being taken on March 1st, 1805. Chase was found not guilty on five of the articles, and guilty on three, but the vote of guilty was by less than the two-thirds majority required by the Constitution. The Senate consisted of thirty-four Senators, and only nineteen voted for conviction on any one article. Of the thirty-four Senators, twenty-five were Republicans and only nine were Federalists, but six of the Republicans refused to vote for conviction on the ground that the matters proven against Chase did not amount to a crime. The impeachment proceedings thus failed, because Jefferson was unable to hold all of his followers to his theory of the place of impeachment in the scheme of government provided by the United States Constitution.

This defeat of Jefferson on the place of impeachment within the scheme of our government was a much greater event in the subsequent development of the Judicial Power than the opinion in Marbury v. Madison. Besides, impeachment was thereby deprived of the meaning which the Framers of the Constitution had evidently intended to give it in so far as it had been expected to be a check upon political misconduct. Jefferson referred to impeachment sometime later as "a farce which will not be tried again"; and his prediction proved correct. The only other time when it was tried against an important officer was in the impeachment of President Johnson, and that ended exactly as did the Chase impeachment.

But the impeachment proceedings against Justice Chase made a deep impression upon the Federal Judiciary, and many of them showed the white feather. One of these was District Judge Richard Peters, who had sat with Judge Chase in the trial of Fries and Callender, and whose possible impeachment was discussed when the impeachment proceedings against Chase were in preparation. Judge Peters was so scared by the mere talk of his impeachment, that he actually refused to sign an order to carry out a decision made by him in the District Court against which there was very great feeling in the State of Pennsylvania. His judgment actually remained unexecuted for five years; and it was not until a mandamus proceeding was issued against him by the Supreme Court that he finally signed the order. (U. S. v. Judge Peters, 5 Cranch, 115)

Jefferson's first presidential term was practically devoted to, and was chiefly characterized by, this struggle against the judiciary. Almost his first act as President was the famous order not to deliver Mr. Marbury his commission; and the last important political event during his first term was the Chase impeachment trial. The struggle closed as we have seen, with the Judiciary in full retreat. But one defeat was suffered by Jefferson during this struggle, but that defeat was bound to have great consequences in the future. However, that defeat was not the decision in Marbury v. Madison, but the failure of the impeachment proceedings against Judge Chase. This was so considered at the time, and must be so appraised with the entire history of a century and a quarter behind us. This, notwithstanding the great importance which has since been attained by Marbury v. Madison and the much greater importance which has been ascribed to it. For not only has the importance of Marbury v. Madison been exaggerated by legal historians, but whatever importance it actually attained in the course of the rise and progress of the Judicial Power in this country was possible only because of the failure of the Chase impeachment. It was the fact that six Republican senators refused to accept the Jeffersonian doctrine of the place of impeachment in our system of constitutional government which made it possible for the pretensions of the Judiciary as expressed by Marshall in Marbury v. Madison to assume the political importance which they did at a later age.

Aaron Burr was Vice President during Jefferson's first term of office, and it was he who presided at the Chase impeachment trial. Whether or not he had any influence on the defection of the six senators from the Jefferson theory of impeachment is now hard to tell. But there was a peculiar significance in the fact that Burr

presided at the impeachment trial of Chase which ended in Jefferson's first political failure. For it was Burr who furnished one of the two great political incidents of Jefferson's second term as President, both of which also involved the Judiciary.

We have already said that the struggle against the Judiciary was the great outstanding political struggle of Jefferson's first presidential term. The only other important political event was the Louisiana Purchase; and, peculiarly enough, the political event just referred to as having involved Burr and the Judiciary was also connected with the Louisiana Purchase, or rather was the result of it. For it was the Louisiana Purchase which made it possible for Burr to conceive his great scheme of Western development—which brought against him the charge of treason on which he was tried, at the urgent insistence of Jefferson, and of which he was acquitted because of the no less earnest determination of Marshall.

With the Burr trial for treason as such we are not concerned; nor are we interested in Marshall's rulings during that trial which brought upon his head much criticism, not only at the time but ever since.

The only interest that the Burr trial has in connection with our subject, and which makes it a matter of serious importance in this discussion, is an incident which, though only a collateral matter in the trial itself, was nevertheless of great significance in the struggle then going on over the Judicial Power. And, characteristically enough, the struggle for and against the Judicial Power as it showed itself in this incident did not take the form of a struggle between the Judiciary and the Legislature, which is its modern form, but between the Judiciary and the Executive, which is the same form it had in Marbury v. Madison. The incident was the ruling of John Marshall, who presided at the trial at circuit, that Thomas Jefferson, President of the United States, could be summoned as a witness before his court.

Burr, as will be recalled, was a leader of the Republican party preceding and during the Revolution of 1800, and was elected as one of the two men who were elected for President and Vice President. Under the old electoral system before the Twelfth Amendment, Jefferson and Burr having received an equal number of votes, the election of President went to the House. This made it doubtful for a time whether Jefferson or Burr would be-

come President of the United States. During this struggle for the Presidency, Burr broke with the Republican leaders. Nevertheless, officially, Burr remained the Republican Vice-President, and it was as such that he was considered during his entire term of office, which included his presiding at the impeachment trial of Associate Justice Chase. At his trial for treason he was represented by the same set of Federalist political lawyers who appeared in all of the political cases during the contest between the Republicans and Federalists over the Judicial Power. And, in fact, notwithstanding Burr's supposed Republicanism, his trial for treason was turned into a contest between the Republicans and the Federalists.

This result was produced largely by Marshall's conduct of the trial, which turned it into a contest against Jefferson. It was primarily in that light that Marshall's ruling that the President of the United States could be subpoenaed in an ordinary trial at the behest of one of the parties was regarded at the time. But the more thoughtful could not help but look upon it as a step in the struggle of the Judiciary to make itself master of the other branches of the Government. However, political party struggle and the struggle against or about the Judiciary, were inseparably interwoven, because the Federalists as a political party were the sponsors of Judicial Supremacy as a political doctrine. Federalism therefore became synonymous with the pretensions of the Federal Judiciary to extend its power over the co-ordinate branches of the Government.

When the attorneys for Burr, all noted Federalists, asked the Court for a subpoena summoning Jefferson as a witness, and this subpoena was issued by John Marshall, the most noted Federalist in public life, it was only natural that this should be viewed from these two angles: First, as a personal affront by the Federalist leaders to the Republican President; and second, as an attempt by the Federalist Judiciary to increase its powers at the expense of another branch of the government which was in the hands of the Republicans, and incidentally take a step in the building up of the cherished Federalist doctrine of Judicial Supremacy.

Jefferson's answer to this attack of the Judiciary upon the Executive Department of the Government was decisive and unequivocal. He not only flatly refused to appear in answer to the subpoena, but denounced the issuance of the subpoena as an

unwarranted assumption of power by the Judiciary and as decidedly unconstitutional. And in this contest over the construction of the United States Constitution, Jefferson won not only a temporary but a permanent victory over John Marshall—his construction of the Constitution was finally adopted by the Judiciary itself, and is now the law of the land.

The other important political event of the second Jefferson administration concerned our foreign policies. It was Jefferson's famous Embargo policy and the passage by Congress of the Embargo Act, which had a certain resemblance to the famous Non-Intercourse Act passed during the Adams administration against France. And the way the Judiciary became mixed up in this problem of foreign relations was strongly reminiscent, at least from the Republican point of view, of the contest between Federalists and Republicans which surged around the Non-Intercourse policy of the Adams administration. From the purely legislative point of view, too, there were points of contact between these two incidents in so far as the Judiciary was concerned. It will be recalled that the Non-Intercourse Acts of the Adams administration were connected with the struggle then raging in Europe between revolutionary France and the anti-revolutionary coalition headed by England. The Federalists were pro-British, and the Anti-Federalists were pro-French. At first the majority of the people of the country were pro-French, but owing to the stupid policy of the Directory the feeling in this country turned from pro-French to pro-British, giving the Federalists an opportunity to follow a pro-British and anti-French policy which culminated in the Non-Intercourse Act of Congress, which, in turn, was followed by the declaration of the Judiciary that we were in a "partial state of war" with France. Geographically, the pro-British party was New England or northern, or perhaps northeastern; while the pro-French were southern and western. Eight years had passed, and the Republicans were now in power instead of the Federalists, and our troubles, so far as our foreign relations were concerned, were with England. The geographic alignment had not changed; nor had the political. New England was still Federalist at least in its upper strata, and still pro-British; while the South and the West were Republican and anti-British. But the government of the country was now Republican; and the Embargo Act was directed against England. In this struggle against England the

nation was considerably handicapped by the decisions of the Federalist judges made during the earlier struggle in furtherance of Federalist policies.

The contest with England was over the right, claimed by England, to search American vessels and to seize former English seamen who had deserted from English vessels or had thrown off their English allegiance and engaged on foreign merchant vessels. This right was based on the English Common Law doctrine, which did not recognize the right of expatriation. And it was this denial of the right of expatriation that the Federalist Judiciary had expressly recognized during the struggle of a decade ago, on the theory that the English Common Law was part of the law of the land in this country.

Had New England Federalism abandoned its pro-British attitude, the sins of the Federalist Judiciary of a decade ago might have been forgotten. But such was not the case. Not only was New England Federalism as pro-British as ever, but it actually threatened to destroy the Union of the States in the pursuit of its pro-British policy. And this readiness to abandon or destroy the Union was directly connected with the struggle against or about the Judiciary. For the first mutterings of Secession were heard in connection with this very question of the Judiciary and its power. It was during the great debate in Congress over the Republican Repeal Legislation that the first threats of secession were made by New England Federalists; and it was upon the passage of the Repeal Act that secession was for the first time seriously talked of in New England Federalist circles. The attitude of many Federalist leaders was that, with the power of the Judiciary as a "bulwark against anarchy" and a "protection to property" gone, the Union was not worth preserving; and that New England would do better to step out and form a confederation of its own. This talk of secession petered out when the judges submitted to the Repeal legislation and put their stamp of constitutionality upon it. But it was revived again, and with much more vehemence, during the troubles with England which led to Jefferson's Embargo policy. Apparently they could be convinced by more sober reflection that property could be protected without the power of the Judiciary to declare laws unconstitutional. But the loss of the shipping trade involved in the Embargo policy was quite a different matter. The losses due to that policy could be

counted in dollars and cents, and were growing from day to day. Secession was therefore now considered not as a political ideal, but as an economic advantage, and the only question was whether it was practicable.

It was at this juncture that an incident occurred which again drew the Judiciary into the political maelstrom. Fortunately for the Federalists, however, the judge directly involved was a Republican and Jefferson's own appointee—Judge William Johnson, who had been appointed an Associate Justice of the United States Supreme Court by Jefferson in 1804. Judge Johnson's action, however, was not only favorable to the New England Federalists, but was directly in line with previous actions of the Federalist judiciary.

To get the full import of this incident in its relation to our subject, we must hark back to a judicial incident growing out of the Non-Intercourse Act. During the early days of Marshall's incumbency of the Chief Justiceship a case came before the United States Supreme Court arising out of the following facts: The Non-Intercourse Act of Congress provided for the detention and search of all American vessels, or vessels suspected to be American, bound for French ports. In sending out instructions to the navy about the enforcement of the Non-Intercourse law, President Adams instructed all naval commanders to detain and search not only vessels bound for French ports, if they were American or suspected of being American, but also all vessels coming from French ports—in order to defeat evasions of the law by vessels taking circuitous routes.

A naval commander, Captain Little, detained a vessel coming from a French port, searched her, and brought her into port. There she was released by an order of court, as it was proved that she was in fact non-American. The owners of the vessel thereupon sued Captain Little for damages for the detention. The trial court refused to give damages for the detention because Captain Little had acted under the President's orders. The Supreme Court reversed the judgment in an opinion delivered by Chief Justice Marshall. In his opinion Marshall said that he had at first been inclined to the opinion that the President's instructions to the Captain were a sufficient protection to him in a suit against him for damages, and that any claim that the owners might have would be against the United States Government it-

self. But that he had changed his opinion, and had come to the view that Captain Little was personally liable in damages, although he was bound by his orders to act exactly as he did.

From the circumstances of the case it is at least a permissible inference that Marshall had previously publicly expressed an opinion different from that on which he now based his judgment; and that his reference to his former opinion was by way of apology. Also, that his change of view was due to the change in the administration, for Adams, who had given the instructions, had in the meantime been succeeded by Thomas Jefferson. But whatever may have been Marshall's reasons for his change of view, the result was undoubtedly unfortunate; for it forever destroyed the possibility of building up under our system of jurisprudence that branch of the law which is known in continental Europe as Administrative Law, the lack of which is now felt to be a great defect in our legal system.

Such was the background against which the incident now to be related occurred. As was the case with the Non-Intercourse Act, there were frequent attempts to evade the Embargo Act. And as with the Non-Intercourse Law, the President's instructions as to the manner of its being carried out differed somewhat from the letter of the law. Under the Embargo Act of 1808 collectors of customs were required to detain any vessel ostensibly bound to United States ports whenever in their opinion the intention was to evade the Embargo. Jefferson, in issuing his instructions, directed the Secretary of the Treasury to detain all vessels loaded with provisions—the difference between the instructions and the letter of the law being that the letter of the law left the detention to the discretion of the collectors, while the instructions made the detention mandatory. This action of the President, which made the Embargo more stringent, naturally evoked severe criticism from the northern Federalists; and his action was attacked as illegal and unconstitutional. In order to test the legality of the Presidential instructions, the owner of a vessel in Charleston petitioned the Circuit Court for that district on May 24th, 1808, for a mandamus to require the Collector to grant a clearance for a vessel bound for Baltimore loaded with rice, clearance of which had been refused by the Collector acting under the President's instructions, the claim being that the Collector personally was of the opinion that the vessel did not intend to evade the Embargo.

Judge Johnson was holding a circuit court at that time in Charleston, and he granted the mandamus, holding Jefferson's instructions to be unwarranted by the statute.

This action created a great stir, not only in political circles, but the country generally. The Federalists were elated, not only because of the practical consequences of the decision, but also because the rebuke to the President came from a Republican judge and his own appointee. In commenting on this incident, Mr. Warren, in his Supreme Court, says:

"No decision in a Federal Court ever rendered up to that time (except that in the Burr Case) received so full publication or so widespread notice in the newspapers. The Federalist press seized upon it with glee as a strong rebuke by a Republican Judge to a Republican President."

That the Federalist press should be jubilant was only natural; and it was equally natural that the Republican press should disapprove of the decision.

The Aurora, a leading Republican organ, thus commented on the decision:

"The following extraordinary case will be read with the greatest astonishment. It affords another memorable example of the profligacy of the Judiciary, who will give to the law an explanation perverting its intention and in violation of the most sacred rights and best policy of the Nation and Government. . . . An additional proof of the monstrous absurdity of what is called the independence of the Judges. They are, in fact, so independent of control and of every other tie but that of their own perverse will, against the very principles of the government, that unless their tenure of office is altered and that corps brought to some sort of responsibility, they must in the end destroy the government. If the laws and policy of the Nation are to be set aside upon a quibble, if the very principles of peace and war are to be involved in the wretched subterfuge and equivocations of this subtle class of men, what avails all the superiority of a representative government which cannot check or chastise the crimes of such a class?"

From our point of view the interest of the incident lies in this: In the first place, had Marshall and the Supreme Court not barred the road to a system of Administrative Law, there would have been no occasion for the Judiciary to interfere for the so-called protection of property, since property can be protected under Administrative Law without judicial interference in delicate re-

lations with foreign powers, or in questions which may have a bearing on such delicate relations as such incidents undoubtedly have. But more important than that is the fact that the protection to property did not necessarily involve the issuing of a mandamus.

In this connection it should be remembered that Marshall's decision, making the captain of the vessel answerable in damages, came years after the detention, and so did not actually interfere with President Adams' carrying out of the policy of his administration as it affected our foreign relations. On the other hand, Judge Johnson's mandamus order was a direct interference with Jefferson's carrying out of the Embargo policy. Such is the nature of Judicial Process. Each succeeding case usually takes a step forward, increasing the scope of its action, once it is started upon a certain course. This nature of judicial action makes it particularly inappropriate for the handling of political matters or interference in other than strictly jural relations.

It was only natural, of course, that Jefferson should resent this direct interference with our foreign relations by way of mandamus, although he probably would have had no criticism to make, at least on constitutional grounds, as to the decision of the Supreme Court in the *Little* case awarding the owners damages—whatever criticism he might have on the clumsiness and general unsatisfactoriness of a system of law, which, on the one hand, relegates an owner who has been injured by government act to the often worthless remedy of a personal judgment against the officer involved, and, on the other hand, exposes that poor officer to the dilemma of either disobeying his superior or being personally answerable in damages.

Jefferson's answer to Judge Johnson's meddling order was immediate and decisive. He at once secured an opinion from his Attorney-General, Caesar A. Rodney, controverting Judge Johnson's statement of the law. This opinion was distributed widely to the press and was sent out to all Collectors with instructions that this opinion instead of that of Judge Johnson should be followed.

Writing to Governor Pinckney immediately afterward, Jefferson said:

"This question has too many important bearings on the constitutional organization of our government to let it go off care-

lessly.... I send you the Attorney-General's opinion on it, formed on great consideration and consultation. It is communicated to the collectors and marshals for their future government. I hope, however, the business will stop here, and that no similar case will occur. A like attempt has been made in another State which, I believe, failed in the outset."

Thus Jefferson threw down the gage of battle to the Judiciary, vindicating his own conception of the equal and co-ordinate position of the three branches of government under the United States Constitution. As far as is known the hope expressed in his letter to Governor Pinckney was realized: "the business" stopped, and no similar case occurred in connection with the Embargo Act.

After Jefferson's rebuff to Judge Johnson, the Supreme Court seems to have definitely settled into the obscurity into which it had fallen with the decisions of Marbury v. Madison and Stuart v. Laird. The first Madison Administration was therefore an uneventful one for the Judiciary. Not that the courts did not have their troubles. On the contrary, in attempting to enforce the decision which Judge Peters had made about the time of the decision in Marbury v. Madison and which had remained unenforced for five years because Judge Peters was afraid to issue an order carrying his decision into execution, the Supreme Court encountered the strenuous opposition of the State of Pennsylvania. Nor did the Supreme Court entirely escape criticism for its other decisions. During this administration, Marshall rendered his first important decision after Marbury v. Madison, that in the case of Fletcher v. Peck, decided in 1810—a decision which brought upon Marshall more criticism than any other, with the exception of the rulings in the Burr Treason Case. But in neither of these cases did the court attempt to enforce the pretensions of Marbury v. Madison. Fletcher v. Peck did not involve the Judicial Power at all; and the criticisms leveled against it were of quite a different nature from those leveled against Marbury v. Madison. Nor did the Judge Peters case deal with any phase of our subject, although it dealt with the powers of the Judiciary. The question there involved related only to the powers of the Federal Judiciary in enforcing their judgments against the opposition of the States; and the court was clearly right in the position it had taken.

But while the particular period here under consideration was a comparatively uneventful one in the history of the United States

Supreme Court, its decisions during that period were not entirely devoid of significance in relation to our subject. There was at least one case decided by the Court during that period which, although little noticed by historians, is nevertheless of very great significance when viewed in connection with the entire history of the Court. That case is Bank of the United States v. Deveaux, (5 Cranch, 61)

In technical legal history this case is known, so far as it is known at all, as one of the cases in which the United States Supreme Court under Marshall's leadership made a grievous error; and therefore had to be reversed some thirty-five years later having in the meantime caused great inconvenience and injuriously affected the regular course of legal development. But its real importance lay in quite a different sphere, as will be seen further on. The technical point decided in the case was that a corporation was not a citizen, and could not therefore be considered a citizen of any state for the purpose of creating the diversity of citizenship required to give jurisdiction to the federal courts. According to this decision, the citizenship of a corporation depended upon the citizenship of the stockholders, and all of the stockholders had to be citizens of a different state from the opposite party in order to furnish the diversity of citizenship requisite for such jurisdiction. This decision was expressly overruled in the case of Railroad Co. v. Letson, decided by the United States Supreme Court in 1844. But the case has a far greater significance from our point of view. In speaking of this case, the historian of the United States Supreme Court says:

"While this case has been noted in the law chiefly for the technical point of jurisdiction thus decided, its real historical interest lies in a fact hitherto unnoted. The case had been intended, in its inception, as a test case on which to obtain the opinion of the Court as to the right of a state to tax the Bank of the United States. It was an action for conversion brought against a tax collector and a sheriff of Georgia, who, under the State statute of 1805 taxing the branches of the Bank, had entered its premises and carried off \$2,004 in silver in payment of the tax. The case, therefore, presented the precise questions which were argued and decided, ten years later, in McCulloch v. Maryland—the right of the State to tax a Federal agency and the power of Congress under the Constitution to charter the Bank."

Then Mr. Warren proceeds to make the following observations: "Had the Court sustained the jurisdiction of the Circuit Court and decided the important constitutional question involved, the course of legal history would have been radically changed. Mc-Culloch v. Maryland would have been anticipated by ten years; Congressional power to charter a bank would have been upheld; the long debates in Congress between 1810 and 1816 over this power would not have occurred; the charter of the old Bank would probably have been renewed; the tremendous difficulties in the financing of the War of 1812 would have been obviated; the feelings of State jealousy over the denial of the State powers of taxation would have been less vigorous than they were ten years later, after a series of State laws had been set aside by the Court. Truly, this decision in the Deveaux Case had a momentous effect, unforeseen by the Court at the time it was rendered by Chief Justice Marshall." (Warren, Supreme Court, I, pp. 391-2)

The statements in the first quotation are undoubtedly true. The facts in the Deveaux Case were exactly the same as those in McCulloch v. Maryland. On the other hand, the speculations contained in the second paragraph are not only unwarranted, but upon examination will be found to be exactly the reverse of historic fact. To begin at the end: The results of the decision were not unforeseen by Marshall. Marshall made many errors of law, but he very seldom made errors of judgment in political matters. In this case there can be no question but that Marshall knew exactly what he was doing. And what he was doing was this: He was hiding behind a screen of unsound legal technicality in order to escape the dilemma with which he was confronted in the Marbury v. Madison and Stuart v. Laird cases; the dilemma of either giving a decision in favor of his political opponents or of running the risk of being severely snubbed by them.

The charter of the First Bank of the United States was to expire in 1811, and the Bank had made an application to Congress for its renewal. But the Republicans who had always been opposed to the Bank were now in power; and it was fairly evident that even if Congress should pass a re-chartering bill, which was extremely doubtful, it would be vetoed by President Madison. President Madison was on record as believing that Congress had no right to charter such a Bank. It was also well known that Madison did not believe that the Judiciary had the exclusive right of interpreting the Constitution, and that he believed with Jefferson that Congress and the President had an equal right with the Judiciary to decide for themselves what is and what is not "con-

stitutional" in their own sphere of action. Instead, therefore, of a decision in favor of the Bank at this time having the effect of obviating the long debates in Congress between 1810-1816 over the power of Congress to charter a Bank, and of insuring the rechartering of the Bank, a decision in the Deveaux Case such as Marshall subsequently gave in McCulloch v. Maryland, would probably have had no other effect than a severe snub to the Court. A reminder that it should mind its own business, and that its business was not that of telling Congress and the President what is and what is not constitutional in legislation.

The probabilities are also that it might have lessened the chances of the Bank being rechartered, because the opponents of the Bank would have raised the cry of an attempt of judicial interference with Congress and the President. Marshall, therefore, decided to take the safer course of declining jurisdiction in a case in which he clearly had jurisdiction. That this involved giving an erroneous decision on a legal proposition did not bother Marshall now any more than when he decided Marbury v. Madison. Marshall's courage consisted in no small degree in not worrying about legal correctness, which he probably considered, like consistency, the bugaboo of small minds.

Since, however, this error was not limited to this case alone, but affected adversely the jurisdiction of the Court as well as the business of the country in later years, he seems to have been troubled by this error much more than by his other legal errors. For we have Judge Story's word for it that he repented him of this error before he died.

For the time being, however, the decision saved the Supreme Court from the necessity of engaging in an unequal contest with its opponents, and enabled Marshall himself to deliver his famous opinion in *McCulloch v. Maryland* ten years later. Thus has been verified the truth of the dictum: "He who fights and runs away, will live to fight another day."

CHAPTER XII

JOHN MARSHALL AND THE RISE OF AMERICAN NATIONALISM

NE of the serious handicaps in the study of American history generally, and of that of the Judicial Power particularly, is the fact that we are working under a cloud of what might be called the New England tradition. For a long time the history of this country, and especially the judicial history of this country, has been written by New Englanders or by people under the influence of New England ideas—with the result that even now we still look at most historic events from what might be called the New England point of view.

One of the fundamental errors of that point of view in regard to American history is the ascription to the Federalists, taken to be synonymous with New Englanders, of a National point of view, and to the Republicans, who in this connection are usually considered as Southerners and Westerners, of the particularistic or States-Rights point of view. According to this tradition in our historiography, the New England Federalists, with the assistance of some New Yorkers, Pennsylvanians, and Virginians, were instrumental in bringing about the adoption of the United States Constitution and the organization of the Federal Government under it; as well as of the maintenance of those principles which led to the formation of a firm national government; and of the extension of such of its powers as were necessary in the building of the United States of America as we know them today. In short, it was due to New England Federalism that the thirteen colonies, which at the time of the Revolution and up to the time of the adoption of the United States Constitution were thirteen independent sovereignties scattered along the Atlantic seaboard, became in due time one nation inhabiting almost the entire continent of North America. And there is a corresponding fundamental error in the history of the Judicial Power to the effect that it was the New England or Federalist conception of the Judicial Power

which was chiefly instrumental in bringing about this great result of national growth and unification. As a corollary to these two theories, Chief Justice Marshall and Daniel Webster have been raised to the status of particular patron saints of American Nationalism.

Nothing is, however, further from the truth. New England Federalism not only did not bring about the rise of American Nationalism, but, if anything, hindered it as far as lay in its power. In fact, the New England Federalists were—to borrow a term which came into use more than a hundred years later in England: "Little Americans." As distinguished from their opponents, who might be called—to borrow the converse term of the later period—"American Imperialists." It may sound strange to those bred in the traditional view of American history to have the New England Federalists referred to as "Little Americans" and Thomas Jefferson and his associates as "American Imperialists." Such, however, was their true relation, on the whole, to the problem involved in these terms, if we divest the term Imperialism of its military connotation—and even as to that the reservation should be made only for the very early Anti-Federalists, such as Jefferson and, possibly, Madison.

These divergent tendencies made their appearance as early as the Constitutional Convention in Philadelphia, and on the floor of that Convention itself. The New England Federalists, or those who were to become the leaders of New England Federalism, manifested on the floor of the Constitutional Convention a strong jealousy and distrust of the growing West; and if they had had their own way in that Convention, the United States Constitution, instead of being what it is, would have been such as would actually have prevented the present United States of America from coming into existence. When the question of the composition of Congress was under consideration, they advocated such an arrangement of representation as would have insured the lasting predominance of the Atlantic Seaboard States. Had they succeeded, the United States of America would almost certainly have been forever limited to practically the territory then comprised within its boundaries. This would probably have led to the secession of the Western territory then within the nominal limits of the United States, which would have naturally gravitated towards the Mississippi. Certainly the vast territories later acquired by purchase

and conquest would, under such circumstances, have remained outside the United States to form other and probably hostile nations and confederations. Such other confederacies were discussed, not only as possibilities but as probabilities, at that time. And it was due only to the influence of the southern states who were favorable to the development of the West, which was then an appendage of the South, that the adoption of the New England scheme was prevented, thereby making it possible for the United States to become the great nation that it now is.

This geographical attitude toward the territorial expansion of the United States has been maintained practically throughout our entire history, or at least until very recently. Throughout this history, the Federalist Party and whatever parties succeeded it as the dominant party of New England from time to time, have opposed the expansion of the United States territory; while the South and West were usually favorable to such expansion.

The earliest instance of the division of opinion on the subject of expansion after the adoption of the Constitution was at the time of the acquisition of Louisiana, which was favored by the South and West, and opposed by the North-East. It is no accident that the first President to extend the boundaries of the United States was Thomas Jefferson, the leader of the Republican Anti-Federalists. And it is due entirely to a misconception of the real course of American history that historians should comment as they have on Jefferson's action in the Louisiana Purchase as though it were something inconsistent with his general political theories or attitude towards the American Constitution and government. It is true that Jefferson personally, being a strict-constructionist, had some doubts as to the manner in which the desired result was to be accomplished, but of the desirability of the result—the enlargement of the territory of the United States by the acquisition of Louisiana—he was never in doubt.

The next important occasion when this division of opinion showed itself was during the War of 1812. The War of 1812 has been a much misunderstood event in American history: Misunderstood, principally, because of the fundamental error referred to, which gave a peculiar slant to the whole of our historiography, at least, until very recently. Without going into a detailed discussion of that subject, which is outside the purview of this work, we shall only note briefly that the traditional view, fostered

by the New England School of History, was that the War of 1812 was fought for free trade and sailors' rights—more particularly against the right claimed by England of the so-called "impressment of seamen." We have already had occasion to point out that the legal theory upon which that English claim rested—namely, the denial of the right of expatriation—was upheld during the first decade of the existence of this nation by the Federalist Federal Judiciary with the approval of the whole Federalist Party. We may now add, that the War of 1812 was forced by Southern and Western Republicans, whose interest in sailors' rights must have been problematical, on an extremely unwilling New England Federalism, whose interest in the subject must have been real and immediate.

This is clearly shown by the vote in the House of Representatives on the resolution declaring the war. That resolution was carried by a vote of 79 for to 49 against the war. Of the 79 votes for the war, Pennsylvania and the States south and west of it contributed 62, while the States north and east of Pennsylvania furnished only 17 votes. On the other hand, of the 49 votes against the war, 32 were cast by the States north and east of Pennsylvania, while only 17 came from Pennsylvania and the States south and west of it. This vote clearly justifies the remark of a recent writer on the subject: "Thus the war for 'free trade and sailors' rights' was really rammed down the throats of sailors and traders by planters from the Southern States and backwoodsmen from beyond the Alleghanies." 1

At first glance this seems a rather strange phenomenon. But it is strange only to those who are still under the spell of the New England tradition in American History. To those who have emancipated themselves from that tradition, and who examine the facts of history in order to understand its real course, this phenomenon will not appear strange at all, but perfectly understandable and consistent with the acquisition of Louisiana by Jefferson, which also seems strange to those under the influence of the New England tradition. The fact is that the War of 1812 was a war of expansion in the most literal sense of the phrase. It was primarily a war for the acquisition of territory. The writer just quoted says on this point:

¹ J. W. Pratt, Footnote to The War of 1812, AMERICAN MERCURY, October, 1927.

"The farther one got from the sea, the louder was the cry for war. Why? Because the West and the South were determined to have more territory, and saw in a British war the means of getting it."

The United States went into the War of 1812 because the Southern and Western Republicans hoped thereby to take away Canada from Great Britain and Florida from Spain. The unsatisfactory course of the war prevented those hopes from being realized; and because the war did not actually lead to any expansion, the New England School of American History was enabled to hide the truth of the origin and purpose of the war. And not being able to see or to avow the real purpose, they confounded the occasion of the war, which was a quarrel relating to commerce, with its purpose. And in order to lend it the glamour of a war for principle they called it a war for free trade and sailors' rights -little heeding the fact that the people who were interested in commerce opposed the war, and that the part of the country which was interested in sails, if not necessarily in sailors, had consistently denied these very sailors' rights from the moment the question was raised for the first time in the history of the United States.

But while the War of 1812 completely failed of its purpose in so far as the acquisition of any territory is concerned, it nevertheless forms a turning point in American History. The very fact that the war was possible marked a great change in American opinion and outlook. And this change was greatly enhanced by the results of the war.

The older generations of Republican leaders were Expansionists, but they were peaceful Expansionists. Hence the purchase of Louisiana by Jefferson. But by 1810, the leadership of the Republicans had slipped from the hands of the Virginia school of statesmen, falling into the hands of a new school which was entirely free of the philosophic-humanitarian doctrines of the earlier school. Jefferson, and the "Elder Statesmen" generally, were listened to with respect—and their political creed recited on all formal occasions. But in the ordinary course of life, this creed was little adhered to—new wine having been poured into the old vessels. This new wine was practical and American, as distinguished from the older kind which was philosophic and humanitarian with a strong flavor of French cosmopolitanism.

It was Young America that was now speaking: Not the America that grew up as part of the British system, and fought the War of Independence against that system. But the America that was born, or, at least, had grown up, since Independence. And it went to war with Great Britain not for the principle of "no taxation without representation," or any other principle, but for the acquisition of Canada and Florida.

The embodiment of the new spirit, and the spokesman for Young America, was Henry Clay. Henry Clay, although born in Virginia, went to Kentucky-which was at that time "the West"before he was twenty-one, and thereafter embodied its spirit. He was the chief of a new coterie of leaders of the Republican Party which came to the fore upon the retirement of Thomas Jefferson from the Presidency; and he was one of those most responsible for bringing about the War of 1812. And although the War of 1812 was an unsuccessful war in so far as our foreign relations were concerned, it was a most successful operation from the internal political point of view. At the time of its conclusion the old school of Republican leaders was definitely in retirement, and Young America definitely in the saddle. And Henry Clay was its prophet. The "platform" of Young America as formulated by Henry Clay, the so-called "American System," consisted mainly of two planks: internal improvements and a protective tariffneither of which had been part of the old Republican creed. But not only did Young America introduce new articles into the creed of the old Republican Party-articles which were not in accordance with the spirit of that creed-it actually proceeded to reverse the position of the Republican Party on some of the articles of its creed which had previously been considered too sacred to be touched. The constitutionality of the Bank of the United States was one of them. We have seen that this question had divided Federalists and Republicans practically from the inception of our Government under the Constitution, and only as late as 1811 the re-chartering of the Bank of the United States was defeated, although by narrow margins, in a Congress controlled by the Republican Party—Clay himself being one of those who voted against the re-chartering, taking the position that the Bank was unconstitutional. The vote, however, was the Swan Song of the Old Republican creed. And the very narrow margins whereby the re-charter was defeated (by one vote in the House, and by the casting vote of

the Vice President in the Senate) in a Congress in which the Republican Party had substantial majorities in both houses, showed that serious changes were impending. The War of 1812 hurried the process along. Not only did it bring to the fore a new group of leaders, representing a new interest which has now come to play a dominating rôle in American history, but the economic results of the war made strict adherence to the old creed extremely difficult, if not actually impossible.

The War of 1812 had thrown the currency of the country into great disorder. Upon the closing of the Bank of the United States, the notes of the state banks came into circulation in the place of those of the United States Bank, which were withdrawn. The state banks multiplied very rapidly. In the years 1811-13, one hundred and twenty of them went into operation-many of them with insufficient capital. Working independently of each other, and because of the dislocation of business due to war conditions, many of them got into difficulties, and the entire banking system fell into disorder. They began to reject each other's bills. Then specie payments were suspended. This was followed by reckless paper issues, which produced an inflation of prices. Under these circumstances, the Secretary of the Treasury finally saw no other way to restore order in the currency than by the promptest possible return to specie payment; and to this end he proposed the establishment of a specie-paying national bank, virtually a revival of the old Bank of the United States. The suggestion of the Secretary of the Treasury was followed by the introduction on January 8th, 1816, by John C. Calhoun, another leader of Young America, of a bill providing for a new Bank of the United States which was in all respects similar to the original Bank, except that it was on a larger scale. The new Bank was finally chartered by a bill signed by James Madison, who had all along been of the opinion that the Bank was unconstitutional.

It is interesting to note that while the bill was pending in Congress it was opposed by Daniel Webster and the other Federalists, and was supported by Henry Clay—exactly reversing their positions of five years before. But even more interesting are the reasons given by Madison and Clay for their change of attitude, for they throw light upon the constitutional theories of these two statesmen in connection with the subject of the Judicial Power. These will be considered further below. For the present we are

interested in Young America's program, and that program dealt not with abstract theories but with concrete and immediate problems.

Three weeks after Calhoun reported the bill for the establishment of the Bank of the United States, Clay made a speech in the House in which he outlined his ideas of internal improvements. Before, however, these ideas could be put into form of Congressional legislation, the subject of the tariff was taken up. The Non-Intercourse Act, the Embargo Act, and the War of 1812, while injuring the shipping interests, had served as powerful stimulants to the manufacturing industries of the United States. But upon the coming of peace, the country was flooded by a tremendous influx of English goods. American industry, which had been artifically stimulated during the seven or eight years of disordered foreign relations, now became disordered as a result of the normalization of these relations. Industry as well as finance therefore required to be looked after, and looked after immediately. Again the Secretary of the Treasury came forward with a scheme of protective duties, and in this, as in the case of the Bank, he closely followed the ideas of the first Secretary of the Treasury of the United States, Alexander Hamilton. And in this case also Webster and most of the New England Federalists ranged themselves on the other side, opposing the tariff, while the Republicans supported it—the latter quoting Hamilton's famous Report on Manufactures against the arguments advanced by his nominal followers.

The tariff disposed of, Young America turned again to internal improvements. Accordingly, at the next session of Congress, in February, 1817, a bill was introduced to set apart and pledge the bonus of the National Bank and the share of the United States in its dividends as a permanent fund for "constructing roads and canals and improving the navigation of Watercourses, in order to facilitate, promote, and give security to internal commerce among the several States, and to render more easy and less expensive the means and provisions for the common defense."

Calhoun and Clay were again prominent in pushing this bill in the House. The bill passed both houses, but was vetoed by President Madison. Madison had been favorable to internal improvements, but the bill was so broad in its terms as to arouse his Republican scruples, and the veto was on strictly constitu-

tional grounds. This act, which was a reversion to old-school Republicanism, and greatly disgusted the Young America school of that party, was Madison's last official act. It came at a time when both, old-school Republicanism, as well as its ancient enemy, Federalism, were practically dead, and henceforth a matter of mere history; except in so far as the old name, Republican, was still used as formal homage by the Young Republicans to the sage of Monticello. President Madison was succeeded by James Monroe, the last of the old line of Virginia statesmen, who had been Secretary of State under James Madison, as Madison himself had been under Jefferson. In the Electoral College Monroe received 183 votes as against 34 cast for Rufus King, the candidate of the Federalists. The election marked the final disappearance of the Federalist party; and the actions of Congress contemporaneous with this election marked the disappearance of oldschool Republican ideas from the Republican party. With the disappearance of the Federalist party and the change in the character of the Republican party there set in the so-called "Era of Good Feeling"—a transition period marking the disappearance of old political ideas and the formation of new political alignments -which lasted through the eight years of Monroe's presidency. Towards the end of this period the good feeling disappeared, although the transitional character of the period still remained until the definite formation of the new parties which marked the advent of Jacksonian Democracy in 1828.

The War of 1812 also marked a turning-point in the history of the Judicial Power. But this has been overlooked by judicial historians owing to the fundamental error pointed out above, in the same manner as the real character of the War of 1812 has been overlooked by the general historians of the United States.

The fundamental error in the general history of the United States has been accentuated in the case of our judicial history by the erroneous view taken of the decision in Marbury v. Madison. This latter error was, in itself, however, the result of the more general error before alluded to. The official tradition with respect to Marbury v. Madison divides the history of the Judicial Power in the United States into two unequal epochs: The short period between the adoption of the United States Constitution and Marbury v. Madison, which is represented as a sort of preliminary or testing period; and the post-Marbury period, which is supposed

to be a uniform development of our judicial history under the aegis of John Marshall and his successors in office, lighted by the torch of that great opinion. With such a view of the history of the Judicial Power, turning points in that history are extremely awkward to deal with; so they had best be overlooked. And overlooked they were. In fact, they still are being overlooked, to the great detriment of a real understanding of our history.

Incidentally, this utterly mistaken view of our judicial history leads to an equally mistaken view of the character of John Marshall and of the part he played in that history. Not only is John Marshall erroneously regarded as the founder of the Judicial Power as we know it today; but the character of his various decisions and their relation to the establishment of the Judicial Power have been misunderstood, and Marshall's own attainments as statesman, lawyer, and judge, erroneously appraised. To the laity all of Marshall's judicial opinions subsequent to Marbury v. Madison are supposed to be merely his further exposition of the doctrines laid down in that famous decision, and the application of the general principles there first announced to specific cases or special branches of the law. The lawyer conversant with the cases themselves, and legal historians, know, of course, that that is untrue, and that Marbury v. Madison stands practically in no relation whatever to Marshall's own subsequent decisions. But while the students of the subject know it, this fact is hardly referred to outside of legal academic circles or legal academic publications, and very seldom even there. As a result, John Marshall's fame as far as the laity is concerned rests chiefly on Marbury v. Madison; while constitutional lawyers must continuously quote such decisions as Gibbons v. Ogden, McCulloch v. Maryland, Cohens v. Virginia. And legal historians, at least, cannot help but know the difference between the poor law retailed in Marbury v. Madison and the magnificent law laid down in these later decisions-magnificent, at least, from the point of view of statesmanship and history.

This brings us to the question of Marshall's attainments. These attainments clearly were not in the field of legal scholarship, in which he was greatly excelled not only by his own associate, Judge Story, but by many other jurists of the time—notably Chancellor Kent of New York, who was probably the greatest jurist of that period in this country. Marshall's great abilities and attainments

undoubtedly lay in the field of statesmanship; this is, of course, pointed to by all his admirers, and particularly by those who admire his decision in Marbury v. Madison. But his statesmanship did not lie, as is commonly supposed, in establishing the Judicial Power; and its manifestations should not be looked for in his opinion in Marbury v. Madison, although that opinion clearly exhibits the character of his abilities, which he subsequently used with such telling effect. The fact is, that Marshall's real position in the judicial history of this country can be understood only when taken in connection with our general history, and particularly with the rise of the Young America movement.

Officially, the Young America movement was a movement within the Republican party; a new generation of leaders having arisen within that party to replace the old leaders that were passing away. In reality, however, Young America, while formally taking possession of the Republican Party, informally took possession of the country at large, which is simply another way of expressing the disappearance of the Federalist Party. When Young America took possession of the country, the statesmen of the older generation—that is to say, those who survived the change, took to the woods, or, rather, to their estates. It was only natural that those of the Republican Party, which nominally, at least, continued in power, should be more fortunately placed in this respect, and should still be considered great sages by the country at large, and be paid homage by those in power. It was also natural that the old Federalist leaders who were too set in their ways to accept or understand the new order of things should go into eclipse. But Marshall was too conspicuously placed to be entirely eclipsed, and he was not sufficiently set in his own Federalistic ways not to be able to adjust himself to the new situation. In fact, contrary to the accepted tradition fostered by a historiography which dates the history of the Judicial Power in this country from the decision in Marbury v. Madison, Marshall was essentially an opportunist, and not the bold knight which that tradition would make him out to have been. We have already referred to some of the facts which contradict the official tradition, and we shall have occasion to mention some more.

It so happened that the new orientation was quite in line with Marshall's ideas, particularly on the subject of a strong national government. He therefore became in substance, if not in name, a

leader of the Young America movement; and it was as a leader of that movement, and while using the latitudinarian conception of the Constitution which was characteristic of that movement in aid of measures adopted by Congress in carrying out the program of that movement, that he became a really vital force in American history. And it is on his actions during this period of his Chief Justiceship that his fame should rest. Certain it is that it is the opinions given by Marshall during this period that still remain a live force in American jurisprudence in so far as any of them remain so. In so far as the old Federalist ideas still clung to him into his Young America period, they only hampered the full exertion of his powers; and in so far as they are embodied in decisions they have brought deserved criticism upon him, and none of them have been able to survive the acid test of history.

There is no connection either logical or historical between Marshall's view of the United States Constitution as laid down in Marbury v. Madison—which may be called the Wilsonian view of the Constitution, with its theory of agency and its emphasis upon limitations—and the latitudinarian principles applied by him during his later period, which might be called the Madison view of the Constitution, or even better (with due apologies to the pundits of our judicial history), the Henry Clay view of the Constitution. In fact, if anything, these views are opposed to each other; or, at least, are hard to harmonize, proceeding as they do from entirely different theories of government. All of this clearly appears from a careful examination of Marshall's various decisions during his later period, commencing with the famous decision in McCulloch v. Maryland.

Before proceeding, however, to discuss the decisions of the new period, we must consider two decisions rendered by the Supreme Court in what might be called the transition period. One of these decisions is that of a case very little noticed by judicial historians belonging to the traditional school. And since these are the only historians we have had until very recently, this case has gone practically unnoticed, although its importance in the history of the country ranks with those on which tons of print paper have been consumed. This case is known in the reports under the title of *United States v. Coolidge*, and was decided in 1816. In this case the United States Supreme Court finally settled the question of whether or not the United States had a common

law criminal jurisdiction; the decision being adverse to the contention of the Federalist party. This means, in the first place, that the Sedition Law, which was based on the assumption that such a common law did exist, was unconstitutional. It also means that practically all Federal judges, including the judges of the United States Supreme Court, were wrong in their previous opinions and decisions, and had for years been applying an unconstitutional law resulting in the unjust imprisonment of many persons.

The history of the subject and of the adjudications leading up to the Coolidge case are extremely interesting. In discussing the Alien and Sedition Laws, we have already had occasion to refer to the opinion of the Federal judges on the subject, and to the violent dissent therefrom of the Republicans, particularly Thomas Jefferson. The first judicial note of discord was struck by Judge William Johnson, a Republican and an appointee of Jefferson, who laid down a contrary rule while sitting at circuit. The other judges, however, insisted on the old Federalist doctrine, and continued to apply it in their courts. In 1812 a case of this character reached the United States Supreme Court. It was a case in which one Hudson and one Goodwin had been indicted for libelling the President and the Congress of the United States, and the question was raised by the defendants by a demurrer to the indictment. William Wirt, Madison's Attorney-General, refused to argue in support of the indictment. The court thereupon dismissed the indictment in an opinion written by Judge Johnson. In this opinion, Judge Johnson said:

"The only question which this case presents is, whether the circuit courts of the United States can exercise a common law jurisdiction in criminal cases. We state it thus broadly because a decision on a case of libel will apply to every case in which jurisdiction is not vested in those courts by statute.

"Although this question is brought up now for the first time to be decided by this court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted; and the general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition.

"The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration." (U. S. v. Hudson and Goodwin, 7 Cranch, 32)

This decision seems, however, not to have been accepted as final, notwithstanding Judge Johnson's emphatic language; and attempts were made to revive the doctrine of a criminal common law of the United States during the War of 1812, when many people in New England attempted to evade the provisions of the Trading with the Enemy Act passed by Congress as a war measure. The matter therefore came up again before the United States Supreme Court in the Coolidge case, in which the defendants had been indicted in the Circuit Court of the District of Massachusetts for forcibly rescuing a prize which had been captured by two American privateers. The judges of the Circuit Court were divided in their opinion, and the question was thereupon certified to the United States Supreme Court. The Attorney-General, however, again refused to argue in support of the prosecutionstating that he considered that the matter had been settled against the validity of the indictment in the Hudson and Goodwin Case. But Judge Story declared that he did not consider the question settled by that case. Finally, Judge Johnson was commissioned to deliver the following opinion on behalf of the Court:

"Upon the question now before the court a difference of opinion has existed, and still exists, among the members of the court. We should, therefore, have been willing to have heard the question discussed upon solemn argument. But the Attorney-General has declined to argue the cause; and no counsel appears for the defendant. Under these circumstances the court would not choose to review their former decision in the case of The United States v. Hudson and Goodwin, or draw it into doubt. They will, therefore, certify an opinion to the Circuit Court in conformity with that decision." (U. S. v. Coolidge, et al, 1. Wheaton, 415)

Thus ended ingloriously one of the principal tenets of Federalism and the basis of the obnoxious Sedition Law. Thus was Jefferson's view of the Constitution vindicated, and one of his principal charges of usurpation against the Judiciary established by the Judiciary itself.

The second case we referred to is much better known to the profession than the *Coolidge* case, although it did not have so important an effect upon the law of the United States as a whole. It did, however, have an important bearing upon our immediate subject, and, we believe, one exactly the reverse from that usually assigned to it by judicial historians who follow the accepted tra-

ditions. The case is known as Martin v. Hunter's Lessees, and was decided at the February 1816 term. (1 Wheaton, 304)

This was the final stage of a long litigation begun as far back as 1791, involving a very valuable stretch of territory in Virginia known as the Northern Neck. The case excited great interest and considerable feeling in Virginia throughout its long history. Chief Justice Marshall was personally interested in it, both as an attorney and because he or his brother had a proprietary interest in the land itself.

The opinion in the case was written by Judge Story, but it is usually classed with Marshall's constitutional decisions, being considered the first of the series of decisions in the struggle between the National Government and the States assuring the supremacy of the National Government. There are authorities who believe that Story merely wrote down the decision at Marshall's dictation, or at least under his influence. Other writers of equal respectability hold that Story acted quite independently of Marshall, and stated in this opinion views that he had held for some time past. Be that as it may, there can be no question but that in this decision Story voiced not only his own but also Marshall's views. How closely Story himself considered the connection between his own opinion in this case and Marshall's constitutional views may be seen from the fact that in a volume of Marshall's Writings on the Constitution, published under Judge Story's patronage shortly after Marshall's death (1839), this opinion is printed as an appendix.

To us this opinion is important chiefly as indicating the total bankruptcy of the constitutional theory formulated by Marshall in Marbury v. Madison, and as evidence of a complete break with that theory, if not an actual repudiation of the same, by the United States Supreme Court under circumstances which lead to a strong suspicion that Marshall himself had actually recanted his earlier views. As this view is utterly at variance with the accepted view of that case, as well as with the accepted view of Marshall's position on the subject of the Judicial Power, we feel bound to discuss this case at some length; and we believe such treatment is justified by the importance of the case as marking the close of one epoch and the inauguration of another in the history of the Judicial Power.

The facts were as follows: Lord Fairfax lived en grand seig-

neur on his very extensive property in Virginia. He was an American. He died during the Revolutionary War, devising his lands to a nephew, one Denny Martin, the plaintiff in the case here under discussion, who was then and always had been an Englishman. Under a law of Virginia passed during the Revolution, an alien could not inherit lands in Virginia. The State of Virginia, therefore, claimed that this tract of land had escheated to the State upon Lord Fairfax's death; and proceeded to parcel it out and to convey it by letters patent to various persons, conveying one part to one Hunter, who leased it to the defendant in the case. After the war the land was claimed by Denny Martin and certain Americans under him, among them being some of the Marshall family who had acted as agents for Lord Fairfax.

This litigation was pending in the courts of Virginia for many years, the legal question involved being: whether Denny Martin could inherit the lands under the devise contained in Lord Fairfax's will notwithstanding the statutes referred to. It was claimed on Martin's behalf that under the Treaty of Peace with England of 1783, and the subsequent Treaty of 1794—the so-called Jay Treaty —the Virginia statute could not operate as against him. This litigation culminated in a decision of the highest court of Virginia in 1810, which held against Martin's title. Martin thereupon appealed to the United States Supreme Court, on the theory that the Federal Courts had jurisdiction because of the fact that the two treaties with England were involved; and the United States Supreme Court, by a decision rendered in 1813, reversed the decision of the Virginia courts, holding that because of those two treaties Martin's title to the land was good. The Supreme Court then sent its mandate to the Court of Appeals of Virginia, directing it to give judgment in favor of Martin. (Fairfax's Devisee v. Hunter's Lessee, 7 Cranch, 602)

The opinion, as already stated, was written by Judge Story. Judge Johnson dissented. There has been considerable criticism of this opinion of the Supreme Court, and the decision is considered rather poor law today. However, the historical importance of the case is not in the law there laid down, but in its consequences, which were rather extraordinary, and to our generation almost incomprehensible.

As already stated, there was considerable feeling in Virginia over this litigation, and the decision of the United States Supreme

Court aroused great antagonism. This in itself was not an unusual phenomenon, as many of the Supreme Court's decisions have been received with antagonism then and since. But the unusual thing about this case is that the revolt against the United States Supreme Court was led by the Court of Appeals of Virginia, the highest court in that State. And the importance of the case in connection with our subject lies in the fact that when the mandate of the United States Supreme Court reached the Virginia Court of Appeals, that court proceeded to hoist Mr. Marshall by his own petard, so to say, and they did it so successfully that the Supreme Court was obliged to cut the rope which bound it to the famous decision of Marbury v. Madison in order to get itself loose. When the mandate of the United States Supreme Court was brought before the Virginia Court of Appeals, that court flatly denied the authority of the United States Supreme Court to issue any mandate to it, and proceeded to declare unconstitutional Section 25 of the Judiciary Act of 1791, which gave the United States Supreme Court appellate jurisdiction over the state courts in certain cases.

It will be recalled that this is the same Judiciary Act a part of which Marshall himself had declared unconstitutional in Marbury v. Madison. The Virginia court now proceeded to cite Marbury v. Madison against the United States Supreme Court. But this was comparatively unimportant, as the point on which Marbury v. Madison was cited against the Supreme Court was a minor one. What is of paramount importance is, that it proceeded to reason along the lines of Marbury v. Madison; and since the Virginia court consisted at the time of very able men, it succeeded in erecting a logical structure beyond the power of even Marshall himself to demolish.

The present writer does not accept the reasoning of the Virginia judges. But only because he does not accept the reasoning of Marbury v. Madison. If, however, one argues upon the assumptions and premises of Marbury v. Madison, and follows the logic upon which Marshall based his decision in that case, one cannot but come to the conclusion that the case of the Virginia court was perfect.

Incidentally, the astute lawyers composing the Virginia Court of Appeals managed to point out some of the poor law contained in the United States Supreme Court's decision, quite aside from

Act. But some of the judges—particularly Judge Cabell, whose argument is perhaps the most perfect piece of reasoning of its kind contained in the literature of this subject during the period under consideration—were willing magnanimously to overlook the poor law contained in the United States Supreme Court decision and to stick to the point of constitutionality.

The Virginia Court of Appeals discussed and decided the fol-

lowing three questions:

1.—Whether that portion of Section 25 of the Judiciary Act of 1791 which gave the United States Supreme Court appellate jurisdiction from the State Court in certain cases was constitutional.

2.—Whether, if that Act were constitutional, the particular

case under consideration came within its provisions.

3.—Whether, if the Virginia Court should come to the conclusion that the United States Supreme Court was wrong in considering that portion of Section 25 of the Judiciary Act referring to its appellate power constitutional, the Virginia Court was bound to accept the opinion of the United States Supreme

Court or must follow its own opinion on the subject.

Judge Cabell, as already stated, disdained to discuss the second point, since that involved only the comparatively unimportant question whether the United States Supreme Court was right in this particular judgment. He preferred to limit the discussion to the great question of American constitutional government. Chief Justice Roane, on the other hand, took a malicious pleasure in pointing out the weaknesses of the United States Supreme Court. He therefore discussed all three questions, claiming that the Supreme Court was wrong on all of them. Concededly, the most important question was the last one—namely, whether the Virginia courts had the right to follow their own judgment on the question of constitutionality if they should come to the conclusion that the United States Supreme Court was wrong on the question of jurisdiction. And all the judges sitting in the case agreed with Judge Roane when he announced:

"Upon the whole, I am of opinion, that the Constitution confers no power upon the Supreme Court of the United States, to meddle with the judgments of this court, in the case before us; that this case does not come within the actual provisions of the

25th section of the judicial act; and that this court is both at liberty, and is bound, to follow its own convictions on the subject, anything in the decisions, or supposed decisions, of any other court, to the contrary notwithstanding."

The Virginia Court of Appeals thereupon made the following formal decision:

"The court is unanimously of the opinion, that the appellate power of the Supreme Court of the United States, does not extend to this court, under a sound construction of the constitution of the United States;—that so much of the 25th section of the act of congress, to establish the judicial courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the constitution of the United States; that the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the Supreme Court were coram non judice in relation to this court; and that obedience to its mandate be declined by this court."

It will be observed that Judge Roane's statement of the opinion of the Virginia Court of Appeals with respect to its right to follow its own judgment on the subject of constitutionality is strictly in accord with Judge Wilson's rule on the subject of constitutionality as laid down by him in 1791 in his law lectures. It is also strictly in accordance with the rule of constitutionality laid down by Mr. Abbot in his Concurring Memorandum, contained in the Report of the Special Committee of the New York State Bar Association of 1915. And, what is more important, it follows logically from Chief Justice Marshall's position in Marbury v. Madison that an unconstitutional law is absolutely null and void. If an unconstitutional law is absolutely null and void, no decision of the United States Supreme Court can give it validity or the force of law. Hence Judge Wilson's express statement that everybody who has to act in the matter must decide the question for himself—a position which, as we have seen, was promulgated again as late as 1915 by the learned gentlemen of the Special Committee of the New York State Bar Association, under the official sanction of that great body of lawyers.

This was the nut that the United States Supreme Court had to crack when Mr. Martin again came before it—appealing to it for enforcement of its previous decision which the Virginia Court of Appeal refused to honor. And it must be admitted by any

candid reader of Mr. Justice Story's labored effort that he did not succeed in cracking it. In fact, he made but a poor showing in his attempt. And this poor showing extends to all of the three points decided against him by the Virginia Court of Appeals.

His argument on the first question (which he considered the most fundamental, but which was not so at all, if the Wilson-Marshall theory of constitutionality be adhered to), abounds in petitio principii, or in that trick of argumentation that is commonly called "begging the question"; and he continually travels in circles. His treatment of the second question is, to say the least, "inadequate." But the most interesting part of his opinion to us is his treatment of the third question, and in this he fell down completely. The best he could do was an appeal to common sense and opportunism—a very dangerous procedure for one who starts out from an absolute principle and proceeds to construct a system of government on alleged logical deductions therefrom. Forced to the wall by the rigorous logic of the Virginia court, proceeding from his own principle of want of power, he was compelled to announce that: "from the very nature of things the absolute right of the decision in the last resort must rest somewherewherever it may be vested, it is susceptible of abuse."

But why "must"—if the Constitution did not say so? The position of the Virginia court was in effect: that the Federal and State judiciaries were, under the United States Constitution, each supreme in its own sphere, and that to that extent they may be considered as equal and co-ordinate, instead of inferior and superior—just as the three departments of the National Government itself were equal and co-ordinate. The decision in Marbury v. Madison proceeded upon this very theory, that the United States Constitution did the right of decision in the last resort anywhere. Marshall did not claim there that the Judiciary is superior to the Legislature, but merely that it is coequal with it. But equality meant independence of judgment in all matters within its jurisdiction; and therefore a right to disregard the interpretation of the Constitution by the Legislature and to act on its own judgment. If, therefore, the Virginia court was right in its basic assumption that the state governments were within their own sphere sovereign, and state courts within their own sphere supreme, why must there be an absolute right of decision anywhere?

The whole notion, in fact, of an absolute right of decision somewhere belongs to an entirely different order of ideas in the domain of political science from the ideas underlying Marshall's reasoning in *Marbury v. Madison*. After thus throwing overboard Marshall's rigorous legalistic logic in favor of "common sense," Story proceeds to make some further damaging admissions and assertions:

"A motive of another kind,—says he,—perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution."

A perfectly sound argument for those who believe that the Constitution does not, and in the nature of things cannot, mean the same thing to all men at all times, and that the uncontrolled power to expound the Constitution, therefore, means the power to make it, or, in other words, to be the uncontrolled legislator; and that such a power can only be entrusted to the Legislature, which is the embodiment of the people's sovereignty, and responsible to the people, and cannot possibly be entrusted to a body of men irresponsible to the people and not commissioned to legislate. But Marbury v. Madison proceeds upon an exactly opposite theory. Its basis is that the Constitution always means the same thing. That if two men differ as to the meaning of the Constitution, one must necessarily be right and the other wrong. That this is a legal and not a political question. And that power exercised on a wrong construction of the Constitution is power usurped, and that any action thereunder is, therefore, null and void.

It is because of this alleged nullity of unconstitutional laws

that the Judiciary presumes to disregard an act of the legislature which it believes unconstitutional. How, then, can this situation be affected by such opportunistic considerations as the uniformity of decisions? Much more important considerations have been brushed aside by the Judiciary as unworthy of consideration in the face of the only and paramount consideration: want of power.

Mr. Justice Story's difficulties were the difficulties of his system. The Virginia court drew the logical conclusions from Marbury v. Madison—and Marshall and Story were compelled to disown that decision. Judge Story's embarrassment was the bankruptcy of a system. It is in place here to recall the truly prophetic words which Presiding Judge Pendleton, of the same Virginia Court, is supposed to have uttered when our subject first came up for discussion in a court of law—that the gentlemen who advocated this theory did not quite think of all of its consequences. The fact is that this theory, which is the outgrowth of the extreme individualism of the time when it first came into existence, leads, like all absolute individualism, to nonsense in logic and to anarchy in government.

But the true historic situation and the meaning of this decision are best shown in Judge Johnson's concurring opinion. Judge Johnson, it will be recalled, dissented from the original decision of the United States Supreme Court against which the Virginia Court of Appeals had revolted. He was therefore confronted with a peculiar dilemma: In his opinion, the original decision of the Virginia Court of Appeals was right, and that of the United States Supreme Court wrong. He also sympathized with the decision of the Virginia Court of Appeals on the question of the supremacy of the State courts within their own sphere, and was opposed to the main point involved in Judge Story's argument, namely, that the State courts were in some way inferior to the U.S. Supreme Court. But, on the other hand, the implications of the opinion in Marbury v. Madison, which the Virginia Court of Appeals made the basis of its reasoning on the subject of constitutionality, clearly led to an extension of the Judicial Power

² In Commonwealth v. Caton Presiding Judge Pendleton is supposed to have said: "But how far this court, in whom the judiciary power may in some sort be said to be concentrated, shall have power to declare the nullity of a law passed in its forms by the legislative power, without exercising the power of that branch, contrary to the plain terms of that constitution, is indeed a deep, important and I will add, a tremendous question, the decision of which might involve consequences to which gentlemen may not have extended their ideas."

which was becoming dangerous to the Union. He therefore offered his good services as a harmonizer, and suggested a solution which seems to have been actually accepted by the Supreme Court, although unnoticed by judicial historians: Namely, that the United States Supreme Court may entertain appeals from state courts under Section 25 of the Judiciary Act and decide whether the state court was right or wrong; but that the Supreme Court has no power to issue any mandate to the state court as to an inferior, and that the state courts have the right to disregard the decision of the United States Supreme Court since it is not binding. upon them.

That was a truly remarkable device to avoid the conflict. But the Supreme Court actually adopted it, for the time being at least and did not send its mandate again to the Virginia Court of Appeals.

In so far as actual action was concerned, the Virginia Court of Appeals remained in possession of the field, although the United States Supreme Court had the last word in the matter. This in itself is very significant of the historical situation at that time. But even more significant is Judge Johnson's language on that memorable occasion. In his concurring opinion Judge Johnson said:

"It will be observed in this case, that the court disavows all intention to decide on the right to issue compulsory process to the state courts; thus leaving us, in my opinion, where the constitution and laws place us-supreme over persons and cases as far as our judicial powers extend, but not asserting any compulsory control over the state tribunals.

"In this view I acquiesce in their opinion, but not altogether in the reasoning, or opinion, of my brother who delivered it. Few minds are accustomed to the same habit of thinking, and our conclusions are most satisfactory to ourselves when arrived at in our

own way.

"I have another reason for expressing my opinion on this occasion. I view this question as one of the most momentous importance; as one which may affect, in its consequences, the permanence of the American Union. It presents an instance of collision between the judicial powers of the Union, and one of the greatest states in the Union, on a point the most delicate and difficult to be adjusted. On the one hand, the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers. Force, which

acts upon the physical powers of man, or judicial process, which addresses itself to his moral principles or his fears, are the only means to which governments can resort in the exercise of their authority. The former is happily unknown to the genius of our constitution, except as far as it shall be sanctioned by the latter; but let the latter be obstructed in its progress by an opposition which it cannot overcome or put by, and the resort must be to the former, or government is no more.

"On the other hand, so firmly am I persuaded that the American people can no longer enjoy the blessings of a free government, whenever the state sovereignties shall be prostrated at the feet of the general government, nor the proud consciousness of equality and security, any longer than the independence of judicial power shall be maintained consecrated and intangible, that I could borrow the language of a celebrated orator and exclaim: 'I rejoice

that Virginia has resisted.'

"Yet here I must claim the privilege of expressing my regret that the opposition of the high and truly respected tribunal of that state had not been marked with a little more moderation. The only point necessary to be decided in the case then before them was, 'whether they were bound to obey the mandate emanating from this court.' But in the judgment entered on their minutes, they have affirmed that the case was, in this court, coram nonly judice, or, in other words, that this court had not jurisdiction over it.

"This is assuming a truly alarming latitude of judicial power. Where is it to end?"

These references to the fallibility of judges, even judges of the Supreme Court, and to the possibility that equally honest and equally learned people, even among the judges themselves, might differ as to the meaning of the Constitution, was merely one of the manifestations of the change which was taking place in the attitude of jurists towards the problem of constitutionality. It affected, primarily, the Judicial Power, of course. But not exclusively so. It affected equally the problem of constitutionality as it presents itself to the legislator. It inaugurated what might be called a "liberal" mode of constitutional construction, in substitution for the old "dogmatic" mode. It is this change that we have referred to as a change from the Wilsonian point of view to the Madison-Clay point of view. It may be worth our while to examine a little further this difference of point of view with reference to the Constitution before proceeding to examine the decisions

during Marshall's later period, in which the new point of view found its application.

We have already pointed out that, according to the Madison point of view, each of the three co-ordinate branches of the government is equally competent to interpret the Constitution and equally empowered to apply its own interpretation within its own sphere of action. So far there is no difference between the Madison view and the Wilson view. We may now refer to another part of the Madisonian conception of the Constitution, which differed from the Wilsonian conception. The Wilson school, as we have already had occasion to point out, looked upon the Constitution as something absolutely finished, containing within itself all the provisions needful in the government of the people of the United States; and not only finished for the time being, but given for all times. Therefore, all that was necessary at any time for the solution of any problem arising in the domain of constitutional law was to expound the true meaning of the Constitution, and the rule of conduct was thereby given. If people differed with respect to any of its provisions it was not because the Constitution itself was uncertain on the point, but because of the weakness of the human intellect, or at least of some human intellect. The problem was essentially one of logic. It was this conception of the Constitution that underlies the reasoning in Marbury v. Madison, as we have already had occasion to point out.

The Madison view of the United States Constitution was entirely different. In his view, the Constitution was not a complete and finished instrument of government, providing rules for all needs and for all occasions that might arise. On the contrary, he believed that the Constitution was left essentially unfinished, and that many of its provisions were uncertain. Uncertain in some cases, because the Framers themselves were uncertain on the point—either because the individual Framers themselves were not quite sure as to what they wanted to put into it; or because, while each of the Framers knew how he wanted to provide for the contingency, there were differences of opinion which it would have been unwise to fight out, and they therefore purposely left the matter open and unsettled. And uncertain in other cases, because the Constitution was not intended to prescribe

actual rules of conduct, but merely to lay down general principles whereby conduct ought to be governed, and from which rules of conduct might be deduced from time to time as occasion might arise.

In this view of the Constitution, the term "unconstitutional" meant something entirely different from what it meant to James Wilson and his school.

There might, of course, be cases in which "unconstitutional" would mean the same thing to both schools, as where something was done or attempted in flat defiance of an express provision of the Constitution. But such cases were of no great importance in the constitutional scheme as in the ordinary course of the business of government such cases could hardly occur; and when they should occur, they would be in the nature of revolutionary acts, to be treated accordingly. Both Madison and Wilson agreed that when an act of the Legislature fell within the latter description, it was the duty of the Judiciary, as well as of everybody else, to resist the revolutionary act and refuse to carry out the mandate of the Legislature. Both also agreed that if the Constitution left any matter unsettled the Legislature was paramount as to that matter. The question of how much the Constitution left unsettled was, therefore, of great importance. The greater the number of matters not provided for by the Constitution, the greater the latitude given to the Legislature, and the fewer, correspondingly, the occasions when the Judiciary could be justified in disregarding an Act of the Legislature.

There was another and more basic difference in the attitudes of Wilson and Madison and their respective schools towards the Constitution. Wilson, who was a lawyer and a Scotch individualist, looked upon the Constitution as a grant of power from the people, in the nature of a power-of-attorney given by the people to their agents, and therefore to be construed strictly against the grantee. The problem of constitutionality was, therefore, a rather simple one—as simple as the construction of any grant of power in a power-of-attorney. Whatever was not expressly found in it, was not there; and there was the end of the matter. Constitutional grants of power were in derogation of the reserved rights of the people. Nothing could, therefore, pass by implication. Madison, on the other hand—Virginia gentleman, philosopher, and statesman—looked upon the Constitution not as the

grant of power from the people to agents, but as rules of conduct prescribed by the people for themselves, having in mind primarily their own good and convenience. Except, therefore, in certain matters of which there could be no question, and relating principally to the form or structure of government—such as, for instance, the number of houses of Congress, the manner of the election of members of Congress, or of the President—much was necessarily left for future decision.

Guided, of course, by certain general principles laid down in the Constitution. But those principles, because of their general nature, would necessarily give rise to difference of opinion, owing to different circumstances and conditions under which they would have to be applied—and to many other matters which affect different minds differently.

It follows as a first corollary to this conception of the Constitution, that, except in those cases where the Constitution expressly provided for certain forms of government the overriding of which would amount to a revolutionary act, it was the Legislature that had the interpretation of the Constitution in its keeping. For it called for the exercise of discretion, and discretion could be exercised only by the law-giver, the people having specifically left all matters of discretion to the Legislature. And it follows as a second corollary, that the meaning of the Constitution, in so far as its application to actual governmental problems is concerned, does not always remain the same. For the application of the same principles under different conditions must necessarily lead to different courses of action. The same thing might therefore be constitutional in one instance and unconstitutional in another —depending upon a view of the exigencies of the situation. And these two corollaries united to form the third: That the power of the Judiciary to declare laws unconstitutional must be limited to that small class of special cases already referred to, where the breach of the Constitution is so flagrant as to make the act revolutionary—since the appraisement of the exigencies of a situation involving the exercise of discretion is not a judicial but a legislative problem.

Another important result naturally flows from this conception of the Constitution: Constitutionality, in this view, ceases to be a matter of either pure logic or individual conscience. The views of other people whose opinions are entitled to respect, particularly

when adhered to for a long period of time, are in themselves determinative of constitutionality.3 Since the meaning of the Constitution is not absolutely certain, and much depends on the proper application of its general principles, it would bespeak great presumption if a person were to insist on his own opinion as against the opinion of a great majority of his fellowmen held for a long period of time. Also, since the Constitution was made for the people, and it is their instrument of government whereby they govern themselves, their interpretation of its meaning, long and consistently adhered to, is decisive. It is because of this view of the Constitution that Madison found it incumbent upon him to approve the bill creating the Second Bank of the United States, although he had for many years held to the view that it was unconstitutional. Not only had the situation changed with the War of 1812—there thus came into play the principle of changing situation—but the Legislature of the United States had under different conditions come to the same conclusion, adverse to his own, as to the constitutionality of the Bank. In a very interesting letter written many years afterwards Madison states his reasons for approving the bill creating the Second Bank of the United States, as here given. And it is extremely interesting that, although his letter was written after the United States Supreme Court had repeatedly decided the Bank to have been constitutional, Madison does not refer in any way to this judicial opinion, even in connection with the re-chartering of the Bank for a third time, but does refer to the repeated action of the Congress of the United States. To Madison the repeated expressions of opinion by Congress were evidently more important than the opinion of the Supreme Court.

This view of the Constitution was essentially the view held by Young America, and was best expressed by Henry Clay, just

This view is analogous to the views of constitutionality frequently expressed by Mr. Justice Holmes—as, for instance, when he said, in Lochner v. New York:

"A reasonable man might think it a proper measure on the score of health.

Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work."

But these views are by no means identical. Between them lies a full century—a century of the growth of the Judicial Power. Madison was thinking primarily of himself—that is, of the principles by which his conduct ought to be guided, should he be called upon to act in a matter expressly entrusted to him by the Constitution. While Mr. Justice Holmes is thinking of the circumstances under which he may impose his views of the Constitution upon others engaged in performing functions entrusted to them by the Constitution. The latter possibility was entirely excluded from the Madison theory.

about this time we are considering, in a debate on this very question.

We have already referred to the fact that in 1811 Clay helped defeat the bill for the re-chartering of the First Bank of the United States, and that in 1816 he was instrumental in chartering the Second Bank. In explaining the reasons for his change of front, Clay said:

"The Constitution contained powers delegated and prohibitory, powers expressed and constructive. It vests in Congress all powers necessary to give effect to the enumerated powers. The powers that may be so necessary are deducible by construction. They are not defined in the Constitution. They are in their nature undefinable. With regard to the degree of necessity various rules have been, at different times, laid down; but perhaps, at last, there is no other than a sound and honest judgment, exercised under the control which belongs to the Constitution and the people. It is manifest that this necessity may not be perceived at one time under one state of things. The Constitution, it is true, never changes; it is always the same; but the force of circumstances and the lights of experience may evolve, to the fallible persons charged with its administration, the fitness and necessity of a particular exercise of constructive power today, which they did not see at a former period."

It is evident that under this view of the Constitution the Judicial Power, as we now know it, is quite inadmissible, even if we should believe that the judges are at all times best qualified to ascertain the meaning of the Constitution. For, under the rule of stare decisis, a decision of the Judiciary, once given, remains a judgment for all time. Had Clay's opinion of 1811 been given judicially instead of legislatively, the United States would have lost forever the power to create a Bank. If the exercise of such a power may at one time be constitutional and at another unconstitutional, depending on the exigencies of the situation, Congress must, of necessity, be the sole judge of the question.

It should be borne in mind that the rule here laid down by Henry Clay is quite a different one from that to which the courts sometimes refer as a discretionary power vested by the Constitution in Congress. The courts differentiate between the question of power, and that of discretion in the use of a given power. The questions of power have been settled forever in the Constitution itself, and it is the question of power that the judges are called

upon to determine. At least, in the Marshall view of the Constitution. If the power exists, the exercise of that power is constitutional, and Congress is then at liberty to use it or not to use it. "Unconstitutional," on the other hand, means that the power does not exist, and therefore can never be exercised by Congress, no matter what the exigencies of the situation. But in the Clay conception of the Constitution, whether or not the power exists is itself a matter of circumstances depending upon the exigencies of varying situations. Therefore, whether or not the power exists is itself a matter for legislative determination. Therefore, Clay had a right to say in 1811, under one set of circumstances, that Congress had no power to create a Bank and that its creation would be unconstitutional; while five years later he had a right to say that now Congress has the power under the same Constitution to create a Bank, and that its creation under these circumstances would be constitutional.4 The difference between the two points of view is essentially the difference between that of looking upon the Constitution as a deed-of-grant on the one hand, or as an instrument of government on the other. And it is this change of attitude towards the Constitution that we believe we observe in John Marshall himself at about this time.

It is interesting to note in this connection that when Marshall's qualifications for the Bench were under discussion some of his party associates had misgivings about his fitness, and that those misgivings had to do with this very point. Thus, we are told that Oliver Wolcott wrote to Fisher Ames in December, 1799, that Marshall was "too much disposed to govern the world according to rules of logic; he will read and expound the Constitution as if it were a penal statute." (Quoted in Warren, Supreme Court, I, p. 179)

Marbury v. Madison fully justified this prediction. But twenty years after Marbury v. Madison, Rufus King wrote:

This must not be confused with such a change of circumstances as may bring into play different grants of power under the Constitution. As, for instance, a change from peace to war, or vice versa, with respect to certain matters—such as the creation of a central bank or the issuance of legal tenders—which might conceivably be considered instrumentalities of carrying on war, and, therefore, constitutional when the country is at war but not when it is at peace with the world. In the Madison-Clay view, as we understand it, the mere passage of time, and the experience gained thereby, is in itself such a change of circumstances as to justify a change of opinion as to constitutionality. And this does not mean that the original view was erroneous. Unlike the Common Law—under our official, fictional, theory—constitutionality is not always there, to be discovered, but is a growth, accompanying the growth of the nation itself.

"Prudence is eminently possessed by the Chief Justice who . . . imparts strength and harmony to the constitution."

In order to impart strength, and particularly harmony, to a constitution, it must not be expounded like a penal statute, or a power of attorney. But it is a different Marshall that Rufus King was talking about from the one that Oliver Wolcott referred to. During the twenty years that had elapsed since Marbury v. Madison, that famous decision was not only not acted upon even once, but its underlying principles were permitted to fall into "innocuous desuetude"; and the decisions of the few years immediately preceding the Rufus King letter—the opinions upon which Marshall's fame really rests—were dictated by a radically different, if not exactly opposite, point of view.

In considering Marshall's post-war decisions, we must differentiate between three classes of cases:

1.—Those in which he applied a latitudinarian construction to the Constitution with respect to the powers of Congress, holding that Congress possessed the great powers actually exercised by it under the leadership of Henry Clay, and others of the Young America School, and frustrating the attempts of the states to interfere with the powers thus exercised by Congress.

2.—Those cases in which he attempted to curtail the legislative powers of the states in spheres of competency of the national government, in cases in which the national government had not exercised its powers.

3.—Those cases in which he attempted to curtail the powers of the states in favor of vested property rights of individuals, in matters which had nothing to do with questions of national power.

Marshall's fame rests principally upon the cases embraced within the first category, and it is those decisions that have withstood the march of events and the criticism of History. He was less fortunate in the second class of cases, both in their immediate effect as well as in the judgment of History upon them. And he was least fortunate in those of the last category, as far as the judgment of History is concerned, even though they have evoked the admiration of a certain class of people and still survive as part of an uncritical tradition. As far as our subject is concerned, it is only those of the first class that are of any importance. And their respective importance is almost in exact proportion to the distance which each has traveled away from Marbury v. Madison.

The new era of our judicial history opens definitely with the February, 1819, term of the United States Supreme Court; and, by a peculiar coincidence, there were decided at that term three great cases, one belonging to each of the three categories enumerated above, Marshall writing the opinions in all three. In one of these cases, Marshall wrote one of his two most famous decisions outside of Marbury v. Madison. That was the case of Mc-Culloch v. Maryland, (4 Wheaton 316) in which he affirmed the constitutionality of the Bank of the United States. We have already referred to the fact that during the entire period of the existence of the First Bank of the United States-a period of twenty years—the question of the constitutionality of that institution, although one of the foremost political questions of the day, had never been tested in the courts. We have also referred to the fact that in 1809 Marshall deliberately evaded the issue when it was brought up in the case of the B'k of U.S. v. Deveaux, at a time when the matter was of the utmost importance politically in view of the application of the Bank for a re-charter, which brought the discussion of its constitutionality to the forefront of public interest.

But times had now changed and the Bank was re-chartered by a Republican Congress—the bill for its creation being approved by James Madison, who, next to Thomas Jefferson, had been the foremost opponent of its constitutionality. The Bank still had enemies, and many people still insisted on its unconstitutionality. But with the conversion of Madison and the backing of Young America, Marshall could enter the fray confident of victory—and he wrote one of the most magnificent opinions in the history of our judiciary. There was nothing particularly new or startling in what he said. No more than in what he had said in Marbury v. Madison. But the manner of his saying it was an achievement of no mean importance—far surpassing his achievement in Marbury v. Madison. And this happy result was due in a large measure to the change in his point of view from that of a legalistic attitude toward the Constitution to that of statesmanship. Every paragraph—nay, every sentence—bespeaks this difference in the point of view. The very opening paragraphs show a different approach to the problem: a historico-political approach instead of a legalistic one. After paying his compliments to the importance of the case, he says:

"The first question made in the cause is, has Congress power to

incorporate a bank?

"It has been truly said that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of

undoubted obligation.

"It will not be denied that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted; if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought

not to be lightly disregarded.

"The power now contested was exercised by the first Congress elected under the present constitution. The bill for incorporating the bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity and induced the passage of the present law. It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the constitution gave no countenance."

Marshall then proceeds to lay down his conception of the Constitution as follows:

"This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it neces-

sary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist. . . .

"The government of the United States, then, though limited

in its powers, is supreme. . . .

"Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. . . .

"A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."

And then comes this great admonition, showing the complete break with the power-of-attorney point of view:

"In considering this question, then, we must never forget that it is a constitution we are expounding."

Having thus told us that it was a Constitution, and not a deed, or power-of-attorney, that we are expounding, and that different rules of interpretation must, therefore, be employed, Marshall proceeds to examine that clause in the Constitution which provides that Congress may enact all laws which may be necessary or proper for the carrying out of the powers expressly granted, and gives this clause a liberal interpretation in most sweeping language.

The decision naturally aroused the opposition of the opponents of the Bank, who still clung to the theory that it was unconstitutional; and the opinion received considerable adverse criticism even from some of those who had changed their attitude on the question of the constitutionality of the Bank, because of the sweeping language used in connection with the powers of Congress, particularly under the "necessary or proper" clause. But on the whole, the decision was received with approval, since the country had now definitely embarked on the Bank policy. Those who could differentiate between the decision as to the

constitutionality of the Bank, on the one hand, and the opinion in which this decision was couched, on the other, were naturally very few in number. How strong the current was then running in favor of the Bank can best be seen from the decision in the case of Osborn v. Bank of the United States, (9 Wheaton, 738) decided some five years later, in which the decision in McCulloch v. Maryland was reaffirmed after a new elaborate argument, and in which the Supreme Court, in addition, gave a practical advantage to the Bank by holding that it could sue in the Federal courts.

In the later case Mr. Justice Johnson, who had joined with Chief Justice Marshall in the decision of McCulloch v. Maryland, dissented on the latter point, holding that while the Bank was constitutional it could sue only in the state courts. The question of whether or not the Bank should have been permitted to sue in the Federal courts is of no interest to us now, and we shall therefore not discuss here the differences of opinion on this point between Chief Justice Marshall and Judge Johnson. But Judge Johnson's introductory remarks in his discussion of this point in his dissenting opinion are very interesting, as showing the state of popular opinion on the question of the Bank. Says he:

"I have very little doubt that the public mind will be easily reconciled to the decision of the court here rendered; for, whether necessary or unnecessary originally, a state of things has now grown up, in some of the states, which renders all the protection necessary, that the general government can give to this bank. The policy of the decision is obvious, that is, if the bank is to be sustained; and few will bestow upon its legal correctness, the reflection that it is necessary to test it by the constitution and laws under which it is rendered.

"The Bank of the United States is now identified with the administration of the national government. It is an immense machine, economically and beneficially applied to the fiscal transactions of the nation. Attempts have been made to dispense with it, and they have failed; serious and very weighty doubts have been entertained of its constitutionality, but they have been abandoned; and it is now become the functionary that collects, the depository that holds, the vehicle that transports, the guard that protects, and the agent that distributes and pays away, the millions that pass annually through the national treasury; and all this, not only without expense to the government, but after paying a large bonus, and sustaining actual annual losses to a large

amount; furnishing the only possible means of embodying the most ample security for so immense a charge."

It is clear that, far from heroically fighting windmills, Marshall was in fact dexterously manipulating a strong current of public opinion for the purpose of carrying him forward in enlarging the powers of the National Government by expounding the Constitution as a constitution should be expounded—that is to say, from the attitude of broad statesmanship and not in a narrow legalistic spirit. It should be borne in mind, when appraising these two cases, that Osborn v. The Bank adds nothing to McCulloch v. Maryland as far as any theory or principle of constitutional interpretation is concerned. Also, that as to the additional question decided in Osborn v. The Bank,-which led to the difference of opinion between Chief Justice Marshall and Judge Johnson,—the law laid down by Marshall was rather dubious, and that many of the criticisms contained in Judge Johnson's dissenting opinion are well founded. Fortunately, this question was a temporary and local one. The point is therefore interesting only from the point of view of Marshall biography. It shows Marshall to have been a great statesman, although a rather indifferent lawyer. And, what is more important—it shows Marshall to have been rather careless in his choice of means when an important end was to be accomplished.

One year after the great decision in McCulloch v. Maryland, Marshall had again occasion to expound the United States Constitution on the same point involved in McCulloch v. Maryland,—namely, the powers of the National Government as against the state governments—in the famous case of Cohens v. Virginia.

(6 Wheaton, 264)

The question involved in Cohens v. Virginia, in so far as the immediate subject was concerned, was of much less importance than that involved in McCulloch v. Maryland or Osborn v. The Bank. On the other hand, the general subject involved was somewhat broader than that in the Bank cases; for it went deeper into the question of the relations between the National Government and the state governments. The question was a much more ticklish one from the point of view of practical politics. For the case came from Virginia, which, as we have seen, had defied the United States Supreme Court in the case of Martin v. Hunter's

Lessees, and it concerned the criminal jurisdiction of the states—a subject upon which all of the states were rather sensitive.

The facts in this celebrated case were as follows: When Congress organized the government of the District of Columbia, it gave it the right to institute lotteries for municipal purposes, under certain conditions. The City of Washington thereupon instituted a lottery. The tickets were sold throughout the country, and, among others, by Messrs. Cohen, in Norfolk, Va. But the State of Virginia had a law which made the sale of lottery tickets a criminal offense. The Cohens were therefore arrested for selling these lottery tickets, and the Virginia courts found them guilty and sentenced them to pay a fine. The Cohens then appealed from the decision of the Virginia courts to the United States Supreme Court, claiming that the State of Virginia could not make a penal offense of what had been authorized by a law of Congress. This aggravated the tense situation existing between the Virginia courts and the United States Supreme Court; and the people of Virginia were up in arms against this interference of the Federal courts with their criminal laws. Feeling ran so high that the Virginia Legislature officially instructed the counsel appearing for the State of Virginia before the United States Supreme Court to make a motion in that Court to dismiss the appeal, and if that motion were denied to refuse to argue the case. The Virginia Legislature thus expressly upheld the position of the Virginia Court of Appeals in the case of Martin v. Hunter's Lessees, that the United States Supreme Court has no right to entertain appeals from the state courts.

Accordingly, counsel for the State of Virginia refused to argue the case on the merits, and confined their argument to the question of jurisdiction. One of the counsel for the State of Virginia in this case was Philip B. Barbour, who was afterwards himself an Associate Justice of the United States Supreme Court, and he argued earnestly and elaborately the proposition that Section 25 of the Judiciary Law of 1789 was unconstitutional, and that the United States Supreme Court had no power to hear appeals from the state court—going the entire length of the position taken by the Virginia Court of Appeals in its revolt against the United States Supreme Court,—thus renewing the controversy which was supposed to have been settled in Martin v. Hunter's Lessees. This time it was Marshall himself who spoke for the Supreme Court,

and he wrote one of his most brilliant opinions, ranking with McCulloch v. Maryland and Gibbons v. Ogden.

But before considering this opinion we must call attention to a circumstance usually overlooked by historians, which is, however, interesting both from the point of view of contemporary

history as well as from that of Marshall biography.

As the matter is usually pictured by historians, in this case St. George Marshall boldly attacked the dragon States Rights and inflicted upon him a crushing defeat. This tradition does not, however, represent the facts as they actually happened. In reality, the prudent Marshall dexterously repeated his maneuver of Marbury v. Madison, of bravely letting the bands play while he was marching away from the battle-field: After delivering an opinion strongly upholding the rights of the United States Supreme Court to entertain appeals from the state courts, he gave the decision to the State of Virginia, holding that the Cohens were guilty as found by the Virginia courts, because Congress had never intended that the lottery tickets of the City of Washington should be sold in the State of Virginia, contrary to the criminal laws of that State. By this maneuver Marshall cleverly avoided a defiance by the entire State of Virginia of the decision of the U. S. Supreme Court, which would undoubtedly have occurred if he had decided the case in favor of the Cohens; while at the same time he laid down rules of constitutional interpretation which could be brought forward whenever the opportunity arose which would permit the conversion of the paper rules into instruments of government.

Nevertheless, the opinion in the Cohens case created a great stir, and brought down upon the Supreme Court the criticism not only of the Virginia judges and statesmen but of many others, giving rise to one of the great controversies about the Judicial Power in our history.

The opinion in the Cohens Case is chiefly interesting as furnishing one of the best statements ever presented in favor of the right of the Federal Judiciary under the United States Constitution to declare state legislation unconstitutional. This argument is not only very cogent in itself, but shines particularly in comparison with that made by Mr. Justice Story in his opinion in Martin v. Hunter's Lessees. Judge Story's opinion in the Martin

Case is largely a legalistic one; and from the purely legalistic point of view there is no doubt that the State Rights side has the better of the argument. Marshall, therefore, rejected that line of argument in favor of the line of argument adopted by him in Mc-Culloch v. Maryland,—namely, that it is a Constitution that we are expounding, and not a legal document in the narrower sense of that term.

But the argument in Cohens v. Virginia shines not only by comparison with Judge Story's argument in Martin v. Hunter's Lessees, it shines also in comparison with Marshall's own argument in Marbury v. Madison, which was the prototype of Story's opinion. It is a matter of detail, but a rather interesting detail, that Marshall was compelled in this case to expressly apologize for something he had said in Marbury v. Madison, and which had been used with telling effect by counsel for the State of Virginia, who, as was to be expected, leaned heavily on the legalistic argumentation of Marbury v. Madison. In passing on this point, Marshall said:

"The counsel for the defendant in error urge, in opposition to this rule of construction, some dicta of the court, in the case of

Marbury v. Madison.

"It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Marshall then proceeds to explain away his unfortunate remarks in Marbury v. Madison. Or at least makes a brave attempt to do so. In the process he is compelled to admit that in his reasoning in support of the major point involving the decision in that case he had used "some expressions" "which go far beyond it," and which he is now compelled to repudiate.

Another interesting detail to be noted is, that in rendering the decision of this case upon the merits, Marshall proceeded in the reverse order from that in which he proceeded in Marbury v. Madison. In considering the question upon the merits, Marshall

said, after quoting the Act of Congress under which the Cohens justified their selling of the lottery tickets in the State of Virginia:

"Two questions arise on this act:

"1st. Does it purport to authorize the corporation to force the sale of these lottery tickets in states where such sales may be prohibited by law? If it does,

"2nd. Is the law constitutional?

"If the first question be answered in the affirmative, it will become necessary to consider the second. If it should be answered in the negative, it will be unnecessary, and consequently improper, to pursue any inquiries, which would then be merely speculative, respecting the power of Congress in the case."

He then proceeds to show that the act of Congress in question does not authorize the City of Washington to force the sale of these lottery tickets in states where such sales may be prohibited by law, and he therefore refuses to consider the question of constitutionality, as not involved in the case. Had Marshall followed the same procedure in *Marbury v. Madison*, he would never have written that portion of his opinion which brought upon him the strongest criticism at the time—namely, the one in which he declared Marbury to be entitled to his commission and Jefferson to have violated the law by refusing to let him have it.

By prudently following the maneuver employed by him in Marbury v. Madison, and cleverly improving upon it—probably as a result of his experience in that case—Marshall achieved the fol-

lowing results:

He avoided a defiance by the State of Virginia, which would undoubtedly have followed had he decided the case against the State of Virginia on the merits. He avoided a conflict with Congress, which would undoubtedly have followed if he had decided that the law of Congress under which the Cohens justified was unconstitutional. And he had his chance of upholding the power of the United States Supreme Court over the state courts, at least on paper.

As to the kind of argument made by Marshall in this case, we shall quote here the opinion of Henry Wheaton, a famous lawyer of the time and a great admirer of Marshall's, who wrote:

"Very able and professional men are satisfied that the whole argument against the jurisdiction of the Supreme Court has been completely demolished in the opinion delivered by Chief Justice

Marshall . . . and certainly it bears the strongest marks of his acute and enlarged mind, which when it applies itself to the interpretation of the fundamental law, soars above the ordinary element of a Judge and technical lawyer and displays the wisdom and skill of a great law-giver." (Quoted in Warren, Supreme Court, II, p. 19)

Marshall's next great decision, probably the greatest of all his decisions, came four years after the Cohens case. It was in the case of Gibbons v. Ogden, (9 Wheaton 1) which involved a construction of that part of the United States Constitution which gives to Congress the power to regulate foreign and interstate commerce. Senator Beveridge says that Marshall's opinion in this case "has done more to knit the American people into an indivisible nation than any one force in our history excepting only war." There can be no doubt of the fact that the opinion is a very able one; and it has had a great and lasting influence upon the history of our jurisprudence as well as upon the history of our country. It may be considered as the culmination of Marshall's career as a constructive statesman. It is in complete contrast to Marbury v. Madison, at least in spirit if not in letter, as it is a logical sequel both in spirit and in letter to McCulloch v. Maryland and Cohens v. Virginia.

In the two last-named cases, Marshall, by construing the United States Constitution in a liberal and statesmanlike way, as an instrument of government instead of a deed-of-grant, established the following principles:

1st: That the Federal Government is a National Government, with ample powers to carry out the design of the Framers of the United States Constitution—depending for its powers not upon any particular words used in the Constitution, but on the general purpose which the people had in mind when organizing the government.

2nd. That the National Government was supreme in its own domain, and had the power to carry on its functions untrammelled and unhampered by the state governments.

The new decision went a step further, and established the proposition that in the domain of national powers the National Government is not only supreme, but its authority is exclusive. So that the State governments have no concurrent powers in the same field—at least, not after the National Government has acted

on the subject. And that irrespective of the manner in which Congress had acted on the subject, so long as it had bestowed any attention upon the subject by acting upon it in some way. The decision as well as the opinion in this case are so typical of Marshall at the height of his powers and of his career, showing his strength as well as his weaknesses, that they well deserve more detailed consideration.

The case grew out of the so-called New York Steamboat Monopoly. When Robert Fulton invented the steamboat, the State of New York granted to him and Robert L. Livingston, one of its leading citizens and for a time Chancellor of the State, a monopoly on steamboat navigation in New York Bay and the Hudson River between various ports in New York and New Jersey. This monopoly grew up to be a great financial power, and brought upon itself the odium of the people of those two states. As a result, many attempts had been made to break the monopoly-the attacks being made, naturally, at the point where the monopoly was most vulnerable, namely, where it touched points other than the State of New York. The natural base of operations for the attacks upon this monopoly was the State of New Jersey, and the State of New Jersey had made several grants for the operation of steamships from New Jersey ports with a view to breaking the New York monopoly.

Those who operated the monopoly thereupon resorted to the New York courts in an effort to prevent this competition, with the result that the Chancery Court of New York issued an injunction against those who operated steamboats from New Jersey bases in competition with the Fulton-Livingston monopoly. New Jersey retaliated by outlawing the New York Monopoly, so that there was a legal war between New York and New Jersey over this matter; and it was stated on the floor of Congress at about the time of the decision in Gibbons v. Ogden that four states were practically at war over the matter. So that, while technically the New York Monopoly was based on an appeal to State Rights, there were at least three states opposed to it to one that was interested in it; with the sympathies of the remaining states undoubtedly on the side of those who were trying to break the monopoly. Popular opinion was also against the Monopoly even in New York State. But the law, up to the point when Gibbons v. Ogden was decided in the United States Supreme Court, seemed

to be on the side of the Monopoly, and this not only because the Monopoly had been successful in winning its suits in the New York State courts, but because the New York State courts at the time were of peculiarly high standing in the legal world, and the judges who passed upon this particular question were pre-eminent in the judicial world. Among those who passed on the particular constitutional question involved, and decided it in favor of the Monopoly was Chancellor (and Chief Justice) Kent, who was undoubtedly the greatest Jurist of his day. Another New York judge who passed upon this question favorably to the Monopoly was Smith Thompson, now an Associate Justice of the United States Supreme Court. Another distinguished judge who passed on the question favorably to the Monopoly was Ambrose Spencer, who had succeeded Kent as New York's highest judicial officer, and who would probably have been appointed Associate Justice of the United States Supreme Court if the appointment had not gone to Smith Thompson.

The litigation in the New York courts was bitter and protracted, and New York judges had written able and exhaustive opinions on the subject. The point involved was whether the New York law creating the monopoly ran counter to that provision of the United States Constitution which gave the National Government the power to regulate interstate and foreign commerce, when its effect was to prohibit vessels engaged in the coasting trade between ports of different states under a license from the United States government from entering the ports of New York in competition with the vessels of the Monopoly.

The questions to be decided were as follows:

- 1. Was the power of Congress to regulate foreign and interstate commerce exclusive; or had the states concurrent power in the matter, so that Nation and State could each make its own regulations?
- 2. Assuming that Congress had exclusive power over the subject, was its power so exclusive as to absolutely exclude the states from the right of legislating on the subject, irrespective of whether or not Congress had legislated on it; or would it only become exclusive after Congress had given its attention to the subject by passing some law regulating the subject, the field being free up to that time for state action?

3. What is the exact meaning of the word "regulation," so as to determine when Congress has begun to regulate the subject, or when an act of the State on the subject constituted regulation interfering with the grant of power to Congress?

It is evident that the basic question was whether the states have any concurrent power; for if they have, the interstate trade of the country, which is the most important part of its trade, could be thrown into chaos by the conflicting actions of states and nation, and of the different states themselves.

Next in importance was the definition of the term "regulation" in such a manner as to give the National Government ample power and exclude the powers of the State.

The third question, while important in particular cases, could not be considered a great danger to the National Government. For if it should be held that the states have the power to act in the absence of National action, and if the states should act in a manner to endanger the general welfare, the National Government could always step in, and by its own action terminate the situation created by the action of the states.

But while the last point was of comparatively minor importance generally, it was rather important in the political situation as it existed at this particular time. The subject was a particularly ticklish one in the South in connection with the Negro question. Virginia and South Carolina, for instance, had laws directed against the entrance of free Negroes into these States, and provided for their detention and custody until the vessel in which they arrived should leave port. The validity of the Virginia law had been attacked before Chief Justice Marshall while he was sitting at Circuit in 1820, but he evaded the dangerous subject by construing the statute involved as inapplicable to the facts of the particular case before him. (The Brig Wilson, 1 Brock 423; Elkinson v. De Liesseline, Fed. Cases No. 4336)

The South Carolina statute came up for consideration before Judge Johnson in the fall of 1823, and he squarely held that statute unconstitutional. This decision was bitterly resented by South Carolina, and her officials proceeded to enforce the statute in flat disregard of Judge Johnson's decision. How strong the feeling was on the subject in South Carolina is shown by the fact that one of the counsel said in the argument before Judge Johnson that "if South Carolina was deprived of the right of regulating her

colored population it required not the spirit of prophecy to foretell the result; and rather than submit to the destruction of the state, I would prefer the dissolution of the Union."

Such was the state of legal and popular opinion on the question involved when Gibbons v. Ogden came up for decision before the United States Supreme Court. That Chief Justice Marshall was concerned not only with the legal points but with the state of feeling in the country, is shown by a letter which he wrote to Judge Story after Judge Johnson got into hot water in South Carolina. In this letter Marshall said:

"Our brother Johnson, I perceive, has hung himself on a democratic snag in a hedge composed entirely of thorny State-Rights in South Carolina, and will find some difficulty, I fear, in getting off into smooth, open ground. . . . You have, it is said, some laws in Massachusetts, not very unlike in principles to that which our brother has declared unconstitutional. We have its twin brother in Virginia; a case has been brought before me in which I might have considered its constitutionality, had I chosen to do so; but it was not absolutely necessary, and as I am not fond of butting against a wall in sport, I escaped on the construction of the act." (Quoted in Warren, Supreme Court, II, p. 86)

In the decision of Gibbons v. Ogden, Chief Justice Marshall boldly attacked the Steamboat Monopoly and decided squarely against it on all points, which involved the basic question of whether or not the states had concurrent power with the National Government to regulate interstate commerce. This he decided in the negative, and gave such a definition to the word "regulation" as would give the National Government ample elbow room to operate. He gave the unpopular New York Monopoly a body blow by declaring unconstitutional the law under which it operated. But as he was not fond of butting against a wall, either in sport or otherwise, he carefully avoided touching on the third question-namely, when the power of Congress becomes exclusive -so as to keep out of a fight with Virginia and South Carolina, although he used language from which it followed as a logical conclusion that the Virginia and South Carolina laws were unconstitutional.

Judge Johnson seems to have been greatly dissatisfied with Chief Justice Marshall's opinions, and he therefore wrote a concurring opinion in which he went beyond Marshall and maintained the exclusiveness of the Federal power over commerce in the fullest degree. As a result of Marshall's aversion to butting against walls, "the officials and Courts of South Carolina continued for over twenty-five years to disregard Judge Johnson's opinion and to insist that the decision in Gibbons v. Ogden was inapplicable." (Warren, Supreme Court, II, p. 87)

Marshall thus avoided the only dangerous point in the case, as far as popular feeling was concerned. The rest was clear sailing. How clear the sailing was, as far as popular opinion was concerned, can be seen from the way in which the decision was received by the public and the press. Mr. Warren in his Supreme Court quotes the following newspaper accounts of how the decision was received in various parts of the country.

A Missouri paper said: "Some of the New Yorkers show themselves a little restive under the late decision of the U. S. Supreme Court on the subject of the steam boat monopoly. They may rest assured that it is a decision approved of in their sister States, who can see no propriety in the claim of New York to domineer over the waters which form the means of intercourse between that State and others, and over that intercourse itself."

Shortly after the decision, the newspapers of the North carried this item, according to Mr. Warren:

"Yesterday the Steamboat United States, Capt. Bunker, from New Haven, entered New York in triumph, with streamers flying, and a large company of passengers exulting in the decision of the United States Supreme Court against the New York monopoly. She fired a salute which was loudly returned by huzzas from the wharves."

And "a representative Southern paper" reported that—"On Monday, the 29th, two steamboats from Charleston arrived at Augusta. Their arrival was greeted by the citizens who fired a feu de joie, accompanied by a band of music, which was returned by one of the boats, amidst repeated huzzas and cries of 'down with all monoplies of commerce and manufactories—one is as great an evil as the other. Give us free trade and sailor's rights!"

To this Mr. Warren adds his own opinion that:

"In short, Marshall's opinion was the emancipation proclamation of American commerce." (Warren, Supreme Court, II, pp. 75-6)

As is perfectly natural and proper for an Emancipation Proclamation, Marshall's most famous opinion contains very little legal

lore, and is largely compounded of the wisdom of the statesmen and the eloquence of the popular leader. Marshall opens his opinion by a tribute to the New York courts, which he was about to overrule, in the following language:

"The state of New York maintains the constitutionality of these laws; and their legislature, their Council of Revision, and their judges, have repeatedly concurred in this opinion. It is supported by great names—by names which have all the titles to consideration that virtue, intelligence and office, can bestow. No tribunal can approach the decision of this question, without feeling a just and real respect for that opinion which is sustained by such authority; but it is the province of this Court, while it respects, not to bow to it implicitly; and the judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence which the people of the United States expect from this department of the government."

He then plunges into the subject of constitutional construction:

"It has been said—says he—that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means of carrying all others into execution, Congress is authorized 'to make all laws which shall be necessary and proper' for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the constitution which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction which would cripple the government and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction,

nor adopt it as the rule by which the constitution is to be expounded. . . . If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well-settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee, but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant."

Having thus forcefully and summarily, though not learnedly, disposed of the power-of-attorney theory of the Constitution, Marshall proceeds to give the word "commerce" as broad a meaning as possible, and then continues as follows:

"But it has been urged with great earnestness—says he—that although the power of Congress to regulate commerce with foreign nations, and among the several states, be co-extensive with the subject itself, and have no other limits than are prescribed in the constitution, yet the states may severally exercise the same power within their respective jurisdictions. In support of this argument, it is said that they possessed it as an inseparable attribute of sovereignty, before the formation of the constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

"The appellant, conceding these postulates, except the last, contends that full power to regulate a particular subject, implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part

of it.

"Both parties have appealed to the constitution, to legislative acts, and judicial decisions; and have drawn arguments from all these sources to support and illustrate the propositions they respectively maintain. . . .

"It has been contended by the counsel for the appellant, that, as the word 'to regulate' implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all

others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

"There is great force in this argument, and the court is not

satisfied that it has been refuted.

"Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the states may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that state, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power 'to regulate commerce with foreign nations and among the several states,' or in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous.

"This opinion has been frequently expressed in this court, and is founded as well on the nature of the government as on the words of the constitution. In argument, however, it has been contended that if a law, passed by a state in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the constitution, they affect the sub-

ject, and each other, like equal opposing powers.

"But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the constitution, is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it."

He then concludes as follows:

"The court is aware that, in stating the train of reasoning by which we have been conducted to this result, much time has been consumed in the attempt to demonstrate propositions which may have been thought axioms. It is felt that the tediousness inseparable from the endeavor to prove that which is already clear, is imputable to a considerable part of this opinion. But it was unavoidable. The conclusion to which we have come, depends on a chain of principles which it was necessary to preserve unbroken; and, although some of them were thought nearly self-evident, the magnitude of the question, the weight of character belonging to those from whose judgment we dissent, and the argument at the bar, demanded that we should assume nothing.

"Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it a magnificent structure indeed, to look at, but totally

unfit for use,"

CHAPTER XIII

THE COURTS AND THE RISE OF JACKSONIAN DEMOCRACY

AFTER the Era of Good Feeling came the Jacksonian Revolution. The rise of Jacksonian Democracy forms a sort of blind spot in our historiography. All our historians agree that the election of General Jackson in 1828 was an "upheaval," and that the "reign" that followed it was a turning point in our history. But how the upheaval came about is shrouded in mystery. And so is, more or less, the character of the "reign" itself. According to our official historians, the sequence of events was somewhat as follows:

In the year 1800 the Jeffersonian "revolution" drove out the Federalists, and put the "people" in power. During the two terms of Jefferson's presidency there was considerable trouble afoot, owing to the disturbed political situations in Europe, which culminated in the Embargo Act of 1807. Then came the rise of the West, and the War of 1812 under the domination of the Young Republicans from the West. The peace that followed the War of 1812 completely wiped out the Federalist Party—owing partly to its unpatriotic conduct during the war, and partly to the fact that the peace between this country and England coincided with the close of the Napoleonic Era in Europe, which furnished one of the principal points of division between the Federalists and Anti-In the election of 1816 the Federalist Party, therefore, had no candidate of its own, and in the election of 1820 no one appeared to contest the election of Mr. Monroe, so that he was re-elected unanimously.1 At the close of Monroe's second term, there was considerable sentiment for giving him a third term. Not because of his outstanding services, but because there were no parties and no issues. When it was finally determined that Monroe should not have a third term, four candidates appeared

¹One elector from New Hampshire cast his vote for John Quincy Adams. But it is said that he did so only because he wanted George Washington to remain the only president who had been elected unanimously.

in the field; but they all belonged to the same party, and the contest was purely on personal grounds. Of the four candidates, one—John Quincy Adams—was Monroe's Secretary of State, and therefore heir-apparent. Another one of these candidates, William H. Crawford, was Monroe's Secretary of the Treasury. A third was Henry Clay, for many years the Speaker of the House of Representatives, and principal Congressional leader during the Monroe administration. The only one of the four candidates who was not closely identified with the Monroe administration was General Jackson; but even he was a good Republican, and employed in many important capacities by the Monroe administration. The campaign which these four candidates waged was devoid of any issues; and the electorate could not muster up sufficient enthusiasm for any one of the candidates to give him a majority of the electoral votes. As a result the election was thrown into the House of Representatives.

And then, presto!—an "upheaval," a "revolution." . . .

"Monroe's Administration—says one historian—drew to a close in a mellow sense of popular approval." (Frederick A. Ogg, The Reign of Andrew Jackson, p. 95)

This was in 1824, but the situation was not much different two years later. "As yet—says another historian—speaking of the summer of 1826—the people gave little heed to the outcry of the politicians. . . . They were too busy gathering their crops, selling their wares and merchandise, and enjoying the fruits of prosperity to believe that the charge of bargain and corruption was seriously made. Even the toasts to which the revellers drank on Independence Day show no widespread animosity towards Adams and Clay." (John Bach McMaster, History of the People of the United States, Volume V, p. 502)

But—"In the early months of 1828, the campaign rapidly rose to an extraordinary level of vigor and public interest. Each party group became bitter and personal in its attacks upon the other; in our entire political history there have not been more than two or three campaigns so smirched with vituperation and abuse." (Ogg, op. cit., p. 106)

But what was all this excitement about? According to our official historians the excitement was evidently about nothing, unless it was about the personality of Andrew Jackson.

"The campaign of 1828—writes one historian—was not fought upon the issues of any well established differences in political and

economic policies. Jackson and his followers simply appealed to the mass of the people, especially to the lower classes, 'to turn the rascals out,' on the ground that the 'Old Hero,' the friend of the people, had been cheated, by a corrupt bargain between the two chiefs of the Administration, out of his rights in 1824, and that the whole pack of officials serving under them had been corrupted by the venality of their superiors. The people must take possession of their Government and send the wicked aristocracy of office holders to the right about, was the chief demand of the Democracy of 1828, and it was with the empty phrases, with which they rang the changes upon this demand, that they won the battle. . . .

"It was a tremendous bouleversement. The mob of malcontents had gotten together, had pulled together, and had accomplished their purpose. The old ruling class in American society was driven from place and power, and a new, untried, and inexperienced set of men seized the reins of Government. It looked something like a combination of the South and West against the East." (John W. Burgess, The Middle Period, pp. 163-4)

"Issues—tariff, internal improvements, foreign policy, slavery—receded into the background;—says another historian.—'Hurrah for Jackson!' was the beginning and end of the creed of the masses bent on the Tennesseean's election." (Ogg, op. cit., p. 107)

If our traditional histories be believed, the Jacksonian Democracy came into power without a program of any kind. Not having had any political or economic program to start with, it was hard for it to carry out any definite economic or political program after it came into power. In fact, being composed of heterogeneous elements, held together only by a personality, it was hard for its divergent elements to agree on any political or economic program.

"The Jackson party—says one of the learned historians quoted above—or the Democratic party, must make its creed, both political and economic, and it must adjust that creed both to the Constitution and to the working of the Government. The party was composed of three tolerably distinct divisions, which may be termed the Southern, the Western, and the Eastern divisions. Of these, the Western division alone was a real democracy. The Southern and Eastern divisions were rather aristocracies. The Southern division was emphatically so. And when it came to policies, the Western division favored internal improvements, and the Eastern and Southern divisions opposed them; the Western division favored a tariff on wool and hemp, the Eastern favored moderate protection of manufactures, and the Southern division

wanted as nearly free trade as the revenues of the Government would allow. It was a great task for the Administration to maintain the combination, and keep a reliable majority in Congress." (Burgess, op. cit., p. 165)

And yet-

"The untrained, self-willed, passionate frontier soldier came to power in 1828 as the standard bearer of a mighty democratic uprising which was destined before it ran its course to break down oligarchial party organizations, to liberalize state and local governments, and to turn the stream of national politics into wholly new channels. It was futile for men of the old school to protect and to prophesy misfortunes for the country under its new rulers. The people had spoken, and this time, the people's will was not to be denied." (Ogg, op. cit., p. 114)

More than that-

"It was indeed a great uprising of the people, a triumph of democracy, another political revolution the like of which the country had not seen since 1800, and no more driving from office of a man or class of men. To the popular mind it was the downfall of a corrupt and aristocratic Administration that had encroached on the rights of the States and the liberties of the people, and had used the Federal patronage to carry elections and the Federal treasury to reward its followers. As such the victory was hailed with the wildest joy. The people have rallied in their strength, said one journal, and put down the wealth and power of an overbearing aristocracy, the only stay of a corrupt coalition, and restored the administration of the government to its pristine purity. The same States that voted for Jefferson in 1800 have voted for Jackson in 1828. Those which supported Adams the elder have befriended Adams the younger, with the same result." (McMaster, op. cit., Vol. V, pp. 518-19)

Evidently there was more involved than the mere election of a popular hero. At least the people thought that more than that was involved in the election of Andrew Jackson.

"The people acted, said one who witnessed the scene, as if the country had been rescued from some great danger, and came by thousands from every quarter to behold the triumph of their deliverer. The dress, the language, the behavior of the crowd gave visible evidence of the revolution that had taken place. Never before had so many of the plain people been seen at any one time in Washington." (McMaster, op. cit., Vol. V, pp. 519-20)

"No one who was in Washington at the time of General Jackson's inauguration—wrote another—is likely to forget that period to the day of his death. To us, who had witnessed the quiet and orderly period of the Adams Administration, it seemed as if half the nation had rushed at once into the capital. It was like the inundation of the northern barbarians into Rome, save that the tumultuous tide came from a different point of the compass. The West and South seemed to have precipitated themselves on the north and overwhelmed it." (Ogg, op. cit., p. 119)

But why did the South and West combine against the North? Or, rather, why did they have to combine again, since they had already combined once against the same North, and had produced the Revolution of 1800? And even more important is the question: How is it that so tremendous an overturn came about suddenly, and seemingly without any preliminary struggle, at the end of an era of good feeling?

We know that the Revolution of 1800 was the result of intense party struggles which had agitated the country practically from the organization of the government under the Constitution, and which were continually growing in intensity for a period of nearly ten years. During that time great questions, of both foreign and domestic policy, divided the people. But this upheaval, which appears to have gone much deeper than that of the Jeffersonian uprising of 1800, seems to have come suddenly and without any preparation whatsoever, and for no good reason that our historians can tell.

Professor David Seville Mussey, in summing up the traditional view on this remarkable event in our history, says:

"It was out of the West that the impetus came. In those pioneer communities beyond the mountains differences of social rank disappeared. Men were few and they all counted. Vigor, self-reliance, industry, not birth, privilege, or wealth, were the test of citizenship. The constitutions which the new transmontane states framed as they followed one another rapidly into the Union were almost all completely democratic, providing for manhood suffrage, frequent elections, and popular control of the executive and the judiciary. The influence of the Western democracy on the Eastern states was continuous and strong. One by one the strongholds of privilege fell. The suffrage was widened and the election of many officials was taken from the assemblies or special councils and put into the hands of the people."

But clearly, that is an insufficient explanation for the sudden revolution in the year of our Lord 1828. Concededly, the

principle of democratization was working but slowly up to the period when the Revolution occurred, and gained impetus only after the Revolution. We therefore still have the Revolution to account for. Is it possible that our official historiography has overlooked something that preceded the Revolution of 1828, and which might perhaps be sufficient to account for it? We venture to suggest that such is the case. And we venture to suggest further that the inability to account for the Jacksonian Revolution is very intimately connected with the subject of our main inquiry. We are not writing a general history of this period, and therefore cannot go into details. Our treatment must, of necessity, be only sketchy—the general history of the period being considered only as it is involved in our special subject.

We may begin by suggesting a peculiar analogy between the treatment which the Jacksonian Democracy has received at the hands of our traditional historiography, and the approved method of making legal history under our system of judge-made law. As is well known, judges do not make any laws, but merely apply laws already in existence. But every lawyer and legal historian knows that our law changes not only because of the acts of legislature, but because of the action of judges in adjudicating cases. No judge in deciding a case will say that he is making new law. But judges will say that at a certain time in the past the law had been made by other judges. The legal historian has therefore the following anomaly to contend with continuously: the law is never being changed, but it is nevertheless constantly changing. The changes must, therefore, be always considered in retrospect. It is something akin to this that we have observed in the telling of the Jacksonian Revolution by our regulation historians. No one saw the West rising—at least, no one has reported to have seen it. In fact, those who have witnessed the rising do not even now admit that it was rising in revolt; they still insist that it was merely excited about Andrew Jackson. But when Andrew Jackson was elected, a Revolution had been accomplished, of which we can take notice only in retrospect. Is it possible, perhaps, that this peculiar historical method was adopted in this case by our historians, because we are dealing here with judicial history? In other words, is it possible, perhaps, that the rise of Jacksonian Democracy had something to do with the courts and the Judicial Power? It is our belief that such is the case.

There is a little-frequented corner of our history known to students of the subject as the "Old Court-New Court Controversy" in Kentucky. It is treated by our regulation historians—when treated at all—as a local and temporary aberration; a thing of evil while it lasted, but fortunately of no permanent consequence. Very few of those who have treated the subject have brought it into relation with any larger movement in American history, and none of them ever dreamed of ascribing to it any part in any lasting or permanent change in the history of our country. And there was very good reason for that treatment of the subject—assuming the correctness of our traditional judicial history.

The episode in question was a revolt against the Judiciary; and such revolts must be local, and certainly must be temporary. Mr. Warren, the most scholarly of the historians of the U.S. Supreme Court, does not tire of pointing out again and again the purely local and transitory character of the opposition which has appeared from time to time in our history to the Judiciary in general and the United States Supreme Court in particular. Of the two characteristics thus inherent in all revolts against the Judiciary, transitoriness is by far the more important, from the traditional point of view. One may conceive a majority of the people of the United States temporarily falling under the spell of some illusion resulting in a kind of aberration of mind which expresses itself in opposition to the courts, but one cannot possibly admit or even conceive of such an aberration having a lasting and permanent effect. Such an assumption would be contrary to the laws of nature, as understood by our traditional historians. Opposition to our courts is a thing of evil. As such it cannot, of course, have any beneficial effects upon our history. To admit, therefore, that it had any permanent effect upon our history would be denying our "manifest destiny," which consists in a continuous and steady program from one good to another with but very infrequent and very temporary interruptions. And so we find not only our ordinary general historians, but even our special judicial historians, blind to the larger aspects of this incident in our history. But a careful study of the subject will reveal not only that it had larger aspects, but that it had a peculiar connection with the history of the period which brings that entire history into intimate relation

with the history of the Judicial Power. Which is our excuse for this digression into the local history of the State of Kentucky.

The War of 1812 was, as already pointed out, brought about and run by the West. Kentucky was then the leading state of the West. Clay, who was a Kentuckian, was the leading statesman of the West. Kentucky, therefore, largely typified the West; and, what is more, to a certain extent it typified the entire country outside of New England. What happened in Kentucky during and in consequence of the War of 1812 was therefore not merely local history, but to a certain extent an epitome of what was happening all over the country outside of New England; and these events may be summarized as follows:

The state of "partial war" which preceded the War of 1812 stimulated the growth of manufacturing industries; and the War itself increased this artificial stimulus—with the result that the manufacturing industries became over-expanded. Upon the return of peace, the market for manufactured goods suddenly contracted. Not only was the internal market contracted by reason of the cessation of the special demand due to the war, but England, which had been accumulating a great surplus of manufactured articles for a long period preceding the peace, invaded the American market ready to dispose of her goods at prices far below those which prevailed during the war, and far below those at which American manufacturers could produce at a profit. The tariff act of 1816 was an attempt to remedy this situation, but it was of little effect. The deplorable condition of the manufacturing industries brought about a financial crisis, owing to the expansion of credit which accompanied the expansion of manufacturing and the "boom times." The result was the Panic of 1819, which was not exclusively Kentuckian, nor even exclusively American, but rather a general condition affecting this country as well as Western Europe. Prices, which had been rising for years past, now began tumbling much faster than they had risen. Bankruptcies became general, with the result that debtors were at the mercy of their creditors. As is usual in such situations, people who had considered themselves well-to-do, and even affluent, suddenly saw their fortunes melting away; or, rather, falling into the hands of heartless creditors, who bought in their property at forced sales for much less than what had been considered its real value.

This antagonism between debtors and creditors was complicated by the fact that the creditors were usually Easterners, or, rather, New Englanders-New England then being the seat of monied capital—and by the additional fact that the greatest creditor in the country was the United States Bank. It should also be remembered, in this connection, that in those days imprisonment for debt had not yet been abolished, and there were no homestead laws and no exemption laws. Under the state laws a creditor had the right to, and usually did, take away from his debtor everything that the debtor possessed, including his household goods, and even the clothes off his back; and in addition could throw him into prison for an indefinite time. There was no national bankruptcy law, such as we have today; so that debtors could not get rid of their debts even by turning everything over to their creditors. A poor unfortunate debtor was therefore at the mercy of his creditor for life, without the possibility, such as honest debtors now possess, of making a new start in life by surrendering their present possessions to their creditors.

Under these circumstances many of the states attempted to relieve the situation in various ways, usually by passing insolvent laws which would permit a debtor to relieve himself of his debts by turning over his property to his creditors; and by what were called replevin laws-that is, laws staying sales under execution for a certain period of time, upon giving security, in the hope that the hard times would pass, prices would rise again, and the debtor be enabled to pay his creditors by selling his property at a reasonable price. Some states also passed what were known as "valuation laws," which were laws preventing the sale of property under execution for less than a certain percent of its value as assessed by a jury or some similar agency. Some of the states—particularly the Western states where specie was scarce, all of the gold having been drawn either into New England or into the coffers of the United States Bank-passed various laws designed to give state credit to poor debtors, as measures of relief against the oppression of heartless creditors.

In all of the states the creditor class opposed this legislation, and the creditors usually had on their side most of the lawyers and nearly all of the judges—who naturally ranged themselves on the side of wealth and of what they considered vested rights—although there were numerous exceptions to this rule. Kentucky

was one of the states which passed such relief measures; and owing to the almost equal balance between the two contending forces in that state, it became the focus of this dramatic class struggle. It so happened that while the great majority of lawyers and judges in Kentucky—like their brethren elsewhere—were on the side of the creditor class, some of the foremost jurists of that state ranged themselves on the side of the debtors, so that the debtors had on their side a majority of the people of the state and a fair share of its learning, ability, and intelligence. This question of Debtors' Relief became the principal political cleavage, definitely creating two political parties—the Relief Party and the Anti-Relief Party. And this party cleavage dominated the politics of the State of Kentucky for years prior to the Jackson Revolution of 1828.

The most dramatic incident of this struggle, which occupied the years immediately preceding the Jackson "upheaval," turned around the question of whether or not the courts of Kentucky had a right to declare the Relief Legislation of that state unconstitutional, and contained features unparalleled in the history of the United States. One of these was the simultaneous functioning of two rival Courts of Appeal, each claiming to be the court of last resort of the state.

In 1821 Judge James Clark, one of the circuit judges, declared one of the relief laws unconstitutional. Thereupon charges were preferred against him before the Legislature, and an attempt was made to impeach him. While these proceedings were pending in the Legislature the Court of Appeals, the highest court of the State, upheld Judge Clark's decision and declared the laws unconstitutional, although the three judges differed somewhat as to the extent of the constitutionality of these laws. At the next election, the Relief Party went to the polls upon the issue, squarely presented, of the right of the courts to declare legislation unconstitutional—and obtained a tremendous victory. The new Legislature thereupon attempted to impeach or remove the entire Court of Appeals. But it lacked the two-thirds majority necessary in each house for that purpose under the Kentucky State Constitution. The Legislature thereupon decided to "reorganize" the Court of Appeals, by abolishing the old court and creating a new one—a procedure which required only a simple majority. The three old judges were thus legislated out of office, and a new court

consisting of four judges created, the new judges being taken from the leading lawyers in the Relief Party. The old judges and the Anti-Relief Party which backed them claimed that this procedure was unconstitutional, and the old court insisted that it was the real Court of Appeals. The new court proceeded, however, to organize, and its clerk—Francis P. Blair, destined to play subsequently a great rôle in the Jacksonian Democracy—forcibly possessed himself of the records of the Court of Appeals; and the new court thereupon proceeded to transact business as the Court of Appeals of the State of Kentucky. The parties which had theretofore been known as Relief Party and Anti-Relief Party, now came to be known, respectively, as New Court Party and Old Court Party.

In the meantime, the economic situation had somewhat improved, and the issue was thus changed from the economic question of the relief of indigent debtors to the political question of the right of the courts to declare laws unconstitutional. At the election of 1825 the Old Court Party won at the polls (through corruption, as claimed by the New Court Party) and elected a majority of the Legislature favoring the Old Party. Instead, however, of repealing the act creating the New Court, they attempted to proceed as if the act creating that court was a nullity. But the New Court Party, which still had the Governor on its side, was ready to maintain the New Court by force, unless the acts creating it were formally repealed; and the state was soon upon the verge of a civil war. The Old Court Party thereupon desisted from the use of force, and another election having been held in which the Old Court Party was again victorious, the New Court Party acquiesced in the decision of the people and the New Court went out of existence.

This is where all the historians of this episode close the history of this most unpleasant incident—usually with a few well-chosen remarks about the danger of such aberrations and the futility of all legislation designed to cure economic evils. But the best known historian of Kentucky, while agreeing with the majority of his brethren in the general view of the subject, closes the incident with a remark that is not without its significance in our connection. Judge Collins, in his well known History of Kentucky, says at this point:

"This is one of the most signal triumphs of law and order over the fleeting passions, which for a time overcome the reason of the most sober people, which is recorded in the annals of a free people. It is honorable to the good sense of the people of Kentucky, and strikingly displays their inherent attachment to sober and rational liberty.

"The new court party acquiesced in the decision of the people, and abandoning state politics, they strove to forget their defeat in a new issue of a national character, in which the state became as deeply excited in the year 1827, as it had been in its domestic

policy."

There was very good reason for the transfer of the struggle involved in the "New Court-Old Court" controversy to the national arena. It properly belonged there, and as a matter of fact was merely a local aspect of a national condition. For in deciding upon the constitutionality of the relief laws as they did, the judges of the "old" Kentucky Court of Appeals were merely following the decision of the United States Supreme Court in Sturges v. Crowninshield, which was one of the three decisions already referred to as ushering in the new or Young America Era of the United States Supreme Court.

In the uncritical attitude which our official history has taken of John Marshall, it was only natural that there should be no proper discrimination made between his various decisions or lines of decisions. Everything that Marshall did was great, and everything redounded to the glory of this Nation. Everything, of course, went to the strengthening of the Constitution, or at least of the National Government. As a matter of fact, there were, during the period we are now discussing, two Marshalls—shown in two lines of decisions. The two had very little connection with each other, except that they both had their origin in a common Federalist source. But the relation of the two even to Federalism is not the same. In one case, it was inherent in Federalism itself—in fact, it constituted its principal quality. In the other it was a mere historical accident—the accident of the particular exigency of the political situation in this country during the 1790's. Particularly during John Adams' administration, when the Federal Government represented Federalist foreign policies, and when it was therefore natural that the Federalists should rally to the support of the Federal Government, as against some of the State governments where the center of opposition was located.

As we have already pointed out, Federalism was in its essence not Nationalist. If anything, it was just the reverse—which explains much of the otherwise inexplicable party politics during the Jefferson and Madison administrations. But there was another aspect of Federalism, which showed itself from its very inception and became accentuated during the elder Adams' administration, which was of its very essence. That was its inherent conservatism, its attachment to property rights as against human rights. This had as its consequence a mental and psychological preference for, and therefore a desire to perpetuate in this country, the conceptions of the old common law in its relation to both property rights and human rights—the subordination of the latter to the former. It also meant the sanctification of the property rights of the individual as against the property rights of the community, whether that be represented by a state or the nation.

It was the second aspect of Federalism that Marshall attempted to ingraft upon our jurisprudence, and particularly upon our constitutional law in the second line of decisions referred to above. This line of decisions dates from Sturges v. Crowninshield, (4 Wheat., 122), and the Dartmouth College Case, (4 Wheat., 518), both of which were decided at the same term of court with McCulloch v. Maryland, which, as we have seen, was the starting-point of the Nationalist line of decisions. But the two lines of decisions had a different effect upon their contemporaries, as well as on the history of our constitutional law. As we have already pointed out, the line of decisions which takes its inception with McCulloch v. Maryland and reaches its apogee in Gibbons v. Ogden, has become the very basis of our constitutional system, so far as the relations of the nation to the states is concerned. On the other hand, the doctrines announced in Sturges v. Crowninshield, and Trustees of Dartmouth College v. Woodward, do not now, and have not for a long time past, exercised any actual influence upon our constitutional law, and may be said to have almost completely disappeared therefrom for all practical purposes. Some of the principles laid down in these cases have been formally modified in subsequent decisions. Some have been tacitly abandoned. But even those that still linger on have little practical application.2 The reason is to be found in the fact that these

²The present position of Sturges v. Crowninshield, and particularly of the Dartmouth College Case, is a matter of considerable diversity of opinion in the profes-

decisions attempted to engraft the old notions of the common law with respect to property upon our constitutional system in a manner analogous to that attempted by the Federal judiciary before the "Revolution of 1800" to make the criminal branches of the same common law part of the law of the United States, which, as we have seen, contributed largely to bring about the upheaval of 1800. To paraphrase a well-known statement of Mr. Justice Holmes—they amounted to an assertion that the United States Constitution enacted the English Common Law of the 18th century in so far as the rights of property were concerned. And it was this attempt to do in the domain of civil constitutional law what the Alien and Sedition Laws and their enforcement by the Federal judiciary had attempted to do in the domain of criminal law, that led to the "Revolution of 1828," which was such a striking counterpart of the "Revolution of 1800."

In this respect Sturges v. Crowninshield was much more important than the Dartmouth College Case. The latter had a deep theoretical significance, and its effect upon our constitutional law, if its doctrines had remained unaltered, would have been much more far-reaching than that of Sturges v. Crowninshield. But its effect was not immediate, and would appear only in course of time. It therefore probably had very little influence in bringing about the Revolution of 1828; although that Revolution and the Reign of Andrew Jackson which followed it have done much to destroy its influence. On the other hand, the effect of the decision

sion and among legal historians. Officially, neither has been overruled, and their principles are supposed to have been so "firmly imbedded in our jurisprudence" that they have become a permanent part of our constitutional law. As a matter of fact, however, Sturges v. Crowninshield is of no practical importance whatsoever, now that the National Bankruptcy Law has become a permanent part of our jurisprudence. And as to the "principle" of the Dartmouth College Case, it was concededly modified to a large extent by the Charles River Bridge Case, and again by the Granger Cases, both of which are discussed at length in subsequent chapters: The first, infra, Chapter XV; and the second infra, Chapter XXXIV.

Perhaps the nearest to a correct estimate of the present position of the "principle" of the Dartmouth College Case was given by Mr. Alfred Russell some thirty years ago: "In the thirty years—said he—succeeding the last case (Binghamton Bridge Case, decided in 1865) the College case has been, in general, followed or distinguished according to the political composition of the court. It is a pivotal case between Federal and State-rights doctrine and it will always be viewed favorably, or the contrary, according to the political predilections of the observer." (Status and Tendencies of the Dartmouth College Case, 30 American Law Review, 321). We do not wish to be understood, however, as accepting that portion of Mr. Russell's remarks in which he makes the "following" or "distinguishing" of the Dartmouth College Case dependent on Federalistic or State-rights predilections. It would be more correct to say that this would depend on the general conservative or progressive inclinations of the judges.

in Sturges v. Crowninshield was immediate and direct. Its effect in bringing about the Revolution of 1828 can therefore be easily traced.

Sturges v. Crowninshield was decided in 1819—that is, in the very year of the great crisis which brought about the general demand for relief laws which resulted locally in Kentucky in the Old Court-New Court struggle. The question involved in that case was whether or not the states had the right to pass bankruptcy and insolvent laws in the absence of Congressional action on the subject. It will be recalled that the United States Constitution gives Congress the power to pass uniform bankruptcy laws. But Congress had not exercised the power given to it by the Constitution.3 Some of the states had such laws in some form or other. Among others, the State of New York had a law passed in 1811, which provided that a debtor may be discharged of his debts upon turning over all of his property to his creditors. This is substantially the same as the National Bankruptcy Laws passed subsequently and now in force; except that the National Bankruptcy Laws passed since are much more favorable to the debtors in that they allow many exemptions from the general obligation to turn over all of the debtor's property to the creditors which were not allowed by the state laws as they then existed. As we have already pointed out, the question of a bankrupt's discharge was particularly important at this juncture because imprisonment for debt was still the general law of the land, so that an insolvent debtor was not only compelled to carry through life the incubus of his financial failures, but was subject to imprisonment; and as a result of the Panic of 1819 the prisons were actually filled with unfortunate debtors. The consequent misery was simply appalling, for not only were the breadwinners confined in jails and their dependents deprived of their means of support, but under the barbaric laws of the time, inherited from the English Common Law, neither the public nor the creditors who caused the debtors' confinement in prison were obliged to feed the unfortunate prisoners, and they were frequently allowed to starve unless some charitable organization came to their succor.

³ Congress had adopted a bankruptcy law in 1800. But this law was repealed within eighteen months of its passage, so that at the period in question there was no bankruptcy law; and the legal effect of the repeal of the law of 1800, in so far as the question of the exercise by Congress of the power vested in it by the Constitution was concerned, was the same as if no such law had ever been adopted by Congress.

The question of the right of the states to pass insolvent laws was, therefore, of the greatest importance; and after the Panic of 1819 it became extremely acute. It was at this juncture of events that Sturges v. Crowninshield came before the United States Supreme Court. That court decided that, although under the United States Constitution the states had the right to pass bankruptcy laws in the absence of Congressional legislation on the subject, they could only pass such laws providing they did not impair the obligation of contracts, and that a bankrupt law which discharged the debtor did impair the obligation of contracts, at least in so far as contracts (debts) existing at the time of the passage of the law came into question.

What was the law with reference to debts incurred after the passage of a bankrupt law was left open by this decision; and the disposition of that question forms one of the most curious incidents in the history of the United States Supreme Court, and indeed in the history of our entire jurisprudence. This question, together with the meaning and application of the Dartmouth College Case will be discussed later on. Here it will be enough to say that the principle announced in Sturges v. Crowninshield was sufficient to invalidate practically all of the relief measures passed by the various states for the relief of the sufferers of the Panic of 1819. If this decision meant anything at all, it meant that the existing state of the law at the time a contract was entered into or a debt incurred, including the legal remedies provided by law at the time for the enforcement of the contract and the collection of the debt, were part and parcel of the contract itself, and therefore could not be in any way interfered with by state legislation. This made impossible any remedial legislation looking toward the alleviation of the conditions created by the Panic of 1819, as the load of debt under which the debtors groaned naturally antedated the Relief Legislation.

This was well exemplified in the Kentucky legislation which resulted in the Old Court-New Court controversy. During the early existence of Kentucky as a state, its legislature enacted a law which was copied from the laws of Virginia—of which Kentucky had previously been a part—whereby a sale under execution could be stayed for a certain period of time upon the debtor giving sufficient surety for the payment of the debt. This was known as a replevin law—the execution was said to be replevined (that is,

stayed) for a certain period of time upon the giving of surety. When the Panic of 1819 broke out, the Kentucky statute provided for a three months' replevin period, and one of the first acts of the legislature was to increase that period.

Another act of relief passed when the Relief Party came into power in Kentucky, was the organization of a state bank, which was to lend to poor debtors certain sums upon security which would be sufficient under ordinary circumstances, but which would not be so under the present conditions because of the falling prices. Another evil which the organization of the bank was to remedy was the lack of gold coin, as the financial stringency led to the hoarding of all the gold by the United States Bank and New England capitalists. The Kentucky Bank, which was known as the Commonwealth Bank of Kentucky, and of which the State of Kentucky held the entire capital stock, was to lend to these debtors credit in the form of bills, instead of actual gold cash. In order that these bills should be accepted in payment of debts, it was enacted that the replevin laws should operate only in case the creditor refused to accept the bills of the Commonwealth Bank in payment of the debt.

As these laws finally took shape they were to the following effect: That a creditor who held a judgment could endorse upon the execution that he was ready to take payment in the bills of the Commonwealth Bank, in which event execution would issue immediately. If, however, the creditor failed to endorse upon the execution his willingness to accept bills of the Commonwealth Bank in payment of the debt, the debtor had the right, upon giving sufficient surety, to replevin the debt for a period of two years. The purpose of the legislation is evident. It was not intended to discharge the debtor altogether, nor to stay execution against any debtor who did not have sufficient property for the payment of the debt under ordinary circumstances, but merely to prevent the sacrifice of the debtor's property at a price much below its value at a forced sale under execution when there were no buyers except the creditor himself.

The "old" Kentucky Court of Appeals held, however, following Sturges v. Crowninshield, that these laws impaired the obligation of contracts, and were therefore unconstitutional under the United States Constitution which forbids the states passing laws having that effect. The three judges composing the Court of Appeals

disagreed on the question, apparently left open in Sturges v. Crowninshield, as to whether or not such laws would be unconstitutional with respect to contracts entered into or debts incurred after the passage of the remedial legislation. One judge held that such laws were unconstitutional with respect to all contracts and debts, i.e., that no such laws could be enacted by any state under any circumstances. This opinion coincided, as we shall see later, with the opinion of Chief Justice Marshall, as finally expressed. The other two judges held the Kentucky remedial legislation unconstitutional only with respect to contracts entered into, and debts incurred, prior to the enactment of these laws-sticking closely to the point actually decided in Sturges v. Crowninshield. But for all practical purposes this division of opinion among the judges made no difference, for the legislation was designed to be temporary, being intended to remedy the intolerable situation which already existed at the time of the passage of these laws, which were emergency laws if ever there were such. And the emergency was, naturally, with respect to past debts and not to future ones. The legislation was, in fact, repealed as soon as the emergency had passed. The division of the judges was therefore purely academic, and did not in any way affect the economic situation. As to that situation, the result of the decision in Sturges v. Crowninshield was the impossibility of the enactment of any relief legislation by the States; and since relief was needed and was loudly demanded by nearly all of the states with the exception of New England, we have here the economic situation which resulted in the political struggle which was known locally in Kentucky as "Old Court-New Court" Controversy, and then, nationally, as the Rise of Jacksonian Democracy.

APPENDIX

The following is an abridgment of an article written by William H. Hotchkiss, Esq.—later Mr. Justice Hotchkiss of the Appellate Division of the New York Supreme Court—shortly after the passage of the Federal Bankruptcy Act of 1898, for Harpers' Encyclopedia of United States History, on the subject of Bankruptcy Laws. It illustrates the progress of the views of the civilized world on the subject, and throws considerable light on the nature of the struggle in which the states were engaged during the period under discussion in this chapter, as well as on the nature

of the legal rules which Mr. Justice Story and his associates sought to preserve and perpetuate.

For more than twenty-five centuries the law-makers of the world have been legislating on bankruptcy. Draco, the pioneer, made it, with laziness and murder, punishable by death. Quite naturally there followed an age of the absconding debtor. Solon, not wishing to depopulate Athens, mollified these ancient blue laws, and even abolished enslavement for debt; but the bankrupt and the bankrupt's heirs forfeited their rights of citizenship. The noble Roman and his Twelve Tables were more draconic than Draco. Gibbon tells us that:

"At the expiration of sixty days the debt was discharged by the loss of liberty or life; the insolvent debtor was either put to death, or sold in foreign slavery beyond the Tiber; but if several creditors were alike obstinate and unrelenting, they might legally dismember his body, and satiate their revenge by this horrid partition."

In the time of Cæsar, Roman jurisprudence and civilization had so developed that the debtor, by the famous cessio bonorum, might at least escape slavery, and in most cases retain his civil rights; and about a century later our modern idea of a discharge to the honest debtor who gives up his all was graven on their laws.

Shylock's savage rights may well speak for the laws of the Middle Ages, whose statutes were little better than a transparent palimpsest of the Twelve Tables of Rome. French laws have followed the Latin model, and, while somewhat modernized, even yet visit a degree of disgrace upon the unfortunate trader which would not long be tolerated by an Anglo-Saxon legislature.

Since 1542 about forty bankruptcy laws and a number of insolvent debtor acts have been passed in England. In the United States the statute of 1898 is the fourth of a series of national laws, the others being named from the years 1800, 1841, and 1867; while, in many of the States, and from their very beginning, insolvency statutes of local application and vastly divergent provisions have been on the books.

In view of the interest in the subject, the following chronology may be valuable. We take the English statutes first:

1. The statute of 1542 was aimed at absconding or concealed debtors only. It made them criminals, deprived them of their property without giving them a discharge, and left them to the tender mercies of their creditors. It was followed by a number of similar laws, enlarging its scope and changing its procedure.

2. The statute of 1706, in the fifth year of Queen Anne, marks the next great step in advance. Debt was no longer treated as a crime, and provision was for the first time made for a discharge.

3. The statute of 1825, in the reign of George IV., for the first time recognized voluntary bankruptcies.

4. The statute of 1830 abolished commissioners in bankruptcy, put the administration of estates into the hands of the court, and created the official assignee or receiver.

5. The statute of 1861 made it possible for the non-trader, who had been protected by the insolvent debtor acts for about fifty years, to take advantage of or to be proceeded against under the general bankruptcy laws.

6. The statute of 1869 introduced in England the now well-understood principle of fraudulent preferences; but, the law being easily evaded, it proved a failure.

7. The statute of 1883, as amended by that of 1890, carries the pendulum backward again, and while for the first time distinguishing between a fraudulent bankruptcy and one due solely to misfortune, is drastic in its penalties and intolerable, at least from an American standpoint, in its limitations on the granting of a discharge.

Turning to the United States, we find that:

1. The statute of 1800 was copied from the English law of that time, and did

not provide either for voluntary bankruptcy or for non-traders coming within its terms. It was repealed in December, 1803.

2. The statute of 1841, said to have been largely the work of Daniel Webster, introduced the idea of voluntary bankruptcy into our national jurisprudence. It was in force but eighteen months, being repealed by the Congress that passed it.

3. The statute of 1867 was framed largely on the Massachusetts insolvency law of 1838. It provided for both voluntary and involuntary bankruptcy, and went almost to the extreme in its enumeration of acts of bankruptcy and in its restrictions on the granting of discharges. This law permitted tedious delays and excessive fees. It remained in force until September, 1878.

4. The statute of 1898 swings back towards mercy again. It will be remembered as the first of our statutes to omit that anciently all-important act of bankruptcy, "the suddenly fleeing to parts unknown," and as establishing a new meaning for

"insolvency."

The animated and often acrimonious discussion of bankruptcy legislation has turned on a half-dozen disputed principles and matters of detail. Nowhere, save in the United States, where local insolvency laws have temporarily filled the gap, has the necessity of such legislation been denied. All civilized and many semi-civilized countries enforce such law. France has not been without a bankruptcy law for 400 years, nor England for a period nearly as long. It is settled, too, that such laws should have three purposes: 1. The surrender of the debtor's estate without preferences; 2. Its cheap and expeditious distribution pro rata among all creditors; and 3. The discharge of the debtor from liability to pay provable debts with property which he may afterwards acquire. . . .

The English catalogue of interdicted acts in business has grown long. Two hundred years ago involuntary bankruptcy was even worse than imprisonment for debt, for it involved that; and, prior to the evolution of the idea of a discharge, it practically was civil death. The condition of the English law at that time may be

imagined from this decision of a court of the period:

"If a man is taken in execution and lies in prison for debt, neither the plaintiff at whose suit he is arrested, nor the Sheriff who took him, is bound to find him meat, drink, or clothes; but he must live on his own or on the charity of others, and if no one will relieve him, let him die in the name of God, says the law; and so say I."

CHAPTER XIV

THE IMPAIRMENT OF THE OBLIGATION OF CONTRACTS

HE Dartmouth College Case and Sturges v. Crowninshield both involved the question of the "impairment of the obligation of contracts" within the meaning of the United States Constitution, which provides that no State shall pass any law impairing the obligation of contracts. This is one of the most abstruse questions in our law; but its solution, like that of so many other constitutional questions, is not a matter of legal learning but of political opinion. However, unlike the problems involved in the series of cases running from McCulloch v. Maryland through Cohens v. Virginia to Gibbons v. Ogden, the political question here involved is not that of pure politics—that is, of the form or mechanics of government, such as the relation between the National Government and the State Government-but of political opinion in its social-economic aspects, which usually means the difference between conservatism and liberalism. back of it all looms the question to which all of our political problems ultimately gravitate—the question of the Judicial Power.

In other words, the question which always presents itself to the people of this country in such an emergency is not: What is an impairment of the obligation of a contract?—but: Who is ultimately to decide what is an impairment of the obligation of a contract—the people or the courts? Hence, the question which first made its appearance in the politics of Kentucky as the question of Relief or Anti-Relief, turned into the question of Old Court or New Court—i.e. whether the courts have or have not the right to declare legislation unconstitutional.

It is because of the existence of the Judicial Power, which makes it possible for judges to read into the Constitution, and forever fasten therein, old and musty notions of the English Common Law, that these abstruse questions of law very often become a

matter of life and death to the people of this country. Our readers will therefore bear with us if, in the consideration of these cases, we digress into what may seem to be a technical legal discussion. But there is an even more important reason for this technical discussion. We expect to show in the course of this discussion that these varying technical legal conceptions, which apparently lead judges to such different results, are themselves nothing but intellectual constructions designed to justify their varying social and political views. In the language of a modern writer: It is not the technical legal conception that leads to the decisions pronounced by the judge, but it is the decision which the judge intends to pronounce which leads him to the finding of the technical reasons therefor—the decisions themselves being the result of the judge's views on the social and economic questions involved in the solution of the apparently abstract constitutional problems.

As already stated, the principles announced by the United States Supreme Court in the Dartmouth College Case and Sturges v. Crowninshield are of no great importance in our constitutional law today. Nevertheless, these cases are of more than merely historical interest to us, for the method by which they were adjudicated is in its essential features still the method by which similar problems are disposed of today, except that the abuses of the method have been much aggravated in the course of time.

The actual question involved in the Dartmouth College Case was of great importance locally, but of no consequence whatever outside of the State of New Hampshire, where Dartmouth College is located. The question was whether Dartmouth College must continue forever to be governed in the manner prescribed in the charter granted by King George III in 1769, or its government be subject to the control of the people of the State of New Hampshire. It so happened that for some years prior to the decision of this celebrated case, the people of the State of New Hampshire were very greatly interested in the management of that college, and the question of its management became a political matter, resulting in the passage of a law whereby the management was taken out of the control of the then serving trustees, who under the old charter had the sole right of governing the same and of electing their successors, and put under the control of the state government. This law was attacked as unconstitutional on the alleged ground that it offended against the provision of the United

States Constitution that no state shall pass any law impairing the obligation of contracts—the contention of the trustees being that King George's charter under which the college was organized was a "contract" between King George and the trustees, which the State of New Hampshire could not "impair" by making any changes therein.

The Supreme Court upheld this contention, Marshall writing one of his most celebrated opinions. But Marshall was not the only one who wrote an opinion in this case. In addition to the Chief Justice, Justices Washington and Story also wrote opinions—Mr. Justice Story's opinion being very technical and very learned. Mr. Justice Duval dissented. Mr. Justice Johnson concurred, but only for the reasons given by the Chief Justice—evidently dissenting from the opinions given by Justices Washington and Story; while Justice Livingston concurred in the reasons given by all of the three justices who wrote opinions.

If the Dartmouth College Case had merely decided that particular case, all of these details would be interesting to the specialist but of no interest whatever to the people of the United States, particularly after the lapse of more than a century. But under our form of government, such details are often of great importance to the people at large. In the present instance one of the significant things about these details is that they clearly show that the matter was not a simple one. The question whether or not a charter granted by a government to a corporation engaged in work having a public interest is or is not a "contract" within the meaning of the particular clause of the United States Constitution is a doubtful one, to say the least. Theoretically, as we know, no law, not even a state law, can be declared unconstitutional except in a clear case. But that did not prevent the Supreme Court from declaring this law unconstitutional. And the moment the decision was announced it became, under our theory of the Judicial Power. as much a part of the Constitution as if it had been expressly written therein—at least, until changed by the United States Supreme Court itself.

As a result, this decision about King George's charter to the Reverend Dr. Eleazar Wheelock giving him permission to organize a school for the teaching of Indians, became an event of the greatest importance in the history of the United States. For upon it depended the rights of the people against railroads and other

public utility corporations affecting the development of our country and the well-being of its people.

We need not enter here into the question as to whether or not the decision was right or wrong. But "for the purpose of the record" it should be noted that its correctness has been questioned by some of the most competent legal authorities; and that in the opinion of some legal historians it had a baneful effect upon our history as long as it remained law. The only other thing necessary to note here is that the doctrine there announced was overthrown partially, at least, by the only authority that can with impunity change our Constitution—namely, the United States Supreme Court itself; and that that result was accomplished as a consequence of the Jacksonian Revolution.

Sturges v. Crowninshield, the principal cause of the Jacksonian Revolution, involved, as already stated, a question of a much more immediate importance. The theoretical or constitutional question involved was the same as that involved in the Dartmouth College Case-namely, the provision of the United States Constitution forbidding State legislatures from passing laws impairing the obligation of contracts. The practical question involved was whether a change in the judicial machinery for the enforcement of a judgment so as to make it less effective or less speedy constituted an impairment of the obligation of a contract. opinion in this case was also written by Chief Justice Marshall, and apparently concurred in by all of the Associate Justices. It would seem therefore, at first glance, that, at least as far as this court was concerned, the question was not involved in much doubt. As a matter of fact, the question is beset with very serious difficulties, and the appearance of the record in Sturges v. Crowninshield as to

¹ See note (2) to the preceding chapter, supra, page 329, as to the present status of the doctrines of Sturges v. Crowninshield and Dartmouth College Case. As to the baneful effect of the doctrine of the latter case we may quote the following from Mr. Warren: "The rigid principle of the Dartmouth College Case which heretofore 'had acted like a band of iron on legislative action' was modified by this decision (the Charles River Bridge Case) in favor of the public interests." Whether or not Mr. Warren himself agrees with the authority quoted by him is not quite clear. And it should be stated here that the "baneful effect" of the Dartmouth College doctrine, like its present status in our law, is a matter of diversity of opiniondepending on one's general social and political outlook. The Dartmouth College Case has produced a vast literature, which is likely to grow as time goes on. Since the case has never been formally overruled it is always a potential weapon in the hands of conservatives and reactionaries, and there will always be those who will try to make use of it in the perennial battle between conservatives and progressives. And, as the discussion in the succeeding chapters will show, there is no way of telling just what use will be made of it at some future day by some of Marshall's successors.

the opinions of the judges of that Supreme Court at the time this decision was made is rather deceptive, as was shown by subsequent developments.

We have already referred to the fact that the three judges of the Kentucky Court of Appeals, in passing upon the constitutionality of the Kentucky Relief Legislation, after the decision in Sturges v. Crowninshield had been announced; and presumably following the same, divided as to its exact application; one judge holding that it applied equally to debts incurred prior to the enactment of the legislation in question as well as to debts incurred thereafter, while two of the judges held that the unconstitutionality of the law extended only so far as it affected debts incurred prior to the passage of the law. Immediately following the announcement of the decision in Sturges v. Crowninshield, the United States Supreme Court announced its decision in the case of M'Millan v. M'Neill (4 Wheaton, 209) with a brief opinion reading as follows:

"Marshall, Ch. J., delivered the opinion of the court, that this case was not distinguishable in principle from the preceding case of Sturges v. Crowninshield. That the circumstances of the state law, under which the debt was attempted to be discharged, having been passed before the debt was contracted, made no difference in the application of the principle. And that as to the certificate under the English bankrupt laws, it had frequently been determined, and was well settled, that a discharge under a foreign law was no bar to an action on the contract made in this country."

It would seem, therefore, that in the unanimous opinion of the Supreme Court it made no difference with respect to the class of legislature here in question whether or not the contract sued upon was entered into, or the debt incurred, before or after the passage of the law. Mr. Justice Mills of the Kentucky Court of Appeal was evidently right, and his two associates wrong. It later developed, however, that there was some mistake about the M'Millan v. M'Neill case; and a subsequent discussion of the subject in the United States Supreme Court itself disclosed the startling fact that the judges who sat in Sturges v. Crowninshield had in fact divided in their opinion on the various phases of the subject, and that the decision in that celebrated case was the result of a compromise. This startling disclosure was made in the famous case of Ogden v. Saunders (12 Wheaton, 213), decided in 1827. This case was

first argued at the February term of 1824; but the judges differed in opinion so widely that the case was held over for three years, and was decided only after a new argument of this case, together with other cases which had come up in the meantime, had been ordered by the judges for the further enlightenment of the court. The original argument, as well as the reargument, was made by some of the most brilliant lawyers of the day, including Daniel Webster and Henry Clay. Nevertheless, the judges still failed to agree. As a result, a series of opinions was delivered in the cases on the two questions involved. The final decision, reached by bare majorities, was that, on the one hand, the legislation in question was not unconstitutional with respect to debts incurred after the passage of the law; but, that, on the other hand, the statute, although constitutional, was inoperative as against creditors who were not citizens of the state under whose laws the discharge was obtained—a limitation which drew the teeth of this class of legislation, and was of great practical importance at the time in view of the geographical distribution of the debtor and creditor classes. The first point was decided by a majority consisting of Judges Washington, Johnson, Thompson and Trimble, each of the judges writing a separate opinion; while Chief Justice Marshall wrote a dissenting opinion for himself and Justices Story and Duval. The second point was decided by a majority consisting of Judge Johnson and the three dissenting judges in the other case, while Judges Washington, Thompson and Trimble dissented.

In considering these cases, we must bear in mind the fundamental distinction between these cases and the line of cases McCulloch v. Maryland—Gibbons v. Ogden. In the latter cases the great question was whether the United States Constitution had given the Federal Government certain powers which in the opinion of the Congress were necessary for the efficient carrying out of its purposes, and whether those powers were granted to the Federal Government in such a form as to make them free from interference by the States. An affirmative answer to both of these questions was of vital importance to the proper functioning of the Federal Government. That is why the decisions affirming these propositions met with general approval, except in quarters where either special interest prevailed, or the particularistic theory of government resulting from special interest was invoked. And for the same reason the opposition to these decisions finally disappeared,

and the proposition there laid down became so firmly embedded in our constitutional law that they are no longer challenged.

In the other class of cases—the two lines of cases running, respectively, from the Dartmouth College Case and Sturges v. Crowninshield—the resolution of the constitutional problems either way could not affect either the possession or the proper exercise by the Federal Government of any governmental power. The only question involved was whether the states possessed certain powers which did not in any way affect or run counter to any Federal powers. The answer which these decisions gave was a negative one. With the result that there was a curtailment of the powers of government in the United States—a result exactly opposite to that which flowed from the line of cases McCulloch v. Maryland—Gibbons v. Ogden.

The Sturges and Dartmouth College cases for the first time introduced into our constitutional law the principle "it cannot be done"—that certain things which other civilized governments could do could not be done at all in the United States. Hence the great opposition aroused by these decisions, the continuous struggle over them for the past century, and the zigzag course of the United States Supreme Court itself in its decisions relating to these subjects. The latter depended upon what political party was in power—the expression "political party" being used here not in the sense of a political organization, but of political and social opinion, the cleavage being mainly on the line of conservatism and liberalism.

But while the two lines of decisions, the one starting from the Dartmouth College Case, and the other starting from Sturges v. Crowninshield, have this point in common between them that each effected a diminution of governmental power or efficiency for ameliorative purposes, there were certain important differences between them which led, on the one hand, to different immediate results, and, on the other, to a different historical development. As a result of this difference in historical development, the line of cases starting from Sturges v. Crowninshield has ceased to have any importance whatever in our jurisprudence, except in so far as it may, indirectly, have a bearing on the problems involved in the line of cases starting with the Dartmouth College Case. In the long run, therefore, the Dartmouth College Case and the problems which it unfolds proved the more important. On

the other hand, from the point of view of immediate results and the effect upon the history of the times when these decisions were rendered, Sturges v. Crowninshield and Ogden v. Saunders were by far the more important.

We shall consider the latter line of cases first, as it is that line of cases which is immediately connected with the question of the rise of Jacksonian Democracy, and because it was in Sturges v. Crowninshield that the problem was first presented in its broadest outlines.

In considering the immediate problems involved in the cases Sturges v. Crowninshield and Ogden v. Saunders, we must bear in mind, first of all, that bankruptcy legislation is in itself neither reprehensible from the point of view of morals, nor unusual from the point of view of the exercise of governmental power. On the contrary, bankruptcy laws have always been considered a proper exercise of governmental functions, and have been universally exercised by civilized governments. A survey of the bankruptcy legislation of the civilized world from earliest times to the present day, will show the following practically uniform course of development: The first bankrupt laws were harsh, and sometimes even brutal-being passed mainly for the benefit of creditors instead of for the amelioration of debtors. On the whole, these bankrupt laws merely reflected the general attitude of the law on the relation of debtor and creditor. And it is well to bear in mind that during the early stages of the law the debtor was the "slave" of the creditor, sometimes literally. The Bible says that the debtor is the slave of the creditor. We do not know whether that dictum was meant figuratively or as a statement of the law of debtor and creditor, but we do know that slavery as a result of debt was practiced among the ancient Hebrews. And the same was true of other civilized peoples. A creditor could actually sell his debtor into slavery for the satisfaction of his debt. In countries where slavery was not permitted, imprisonment for debt was often substituted for the selling of the debtor into slavery; and at the time of the decision of Sturges v. Crowninshield imprisonment for debt had not yet been universally, or even generally, abolished even in the United States. Being unable to pay one's debts was considered a crime, often punishable more severely than many another crime which from our present day point of view is considered far more heinous.

Imprisonment for debt was part of the English Common Law which our ancestors brought over with them into the New World, and it had not been abolished in England at the time of the decision in Sturges v. Crowninshield. The early bankrupt laws in England naturally reflected this attitude towards debtors; and the early bankrupt laws in the United States were not much better. But with the progress of civilization, the attitude of enlightened communities toward the problem of debtor and creditor changed fundamentally although only gradually, so that now bankruptcy is universally considered a misfortune rather than a crime. It is emphatically so considered in the United States, which leads the world in leniency towards debtors. In the United States today not only is an honest debtor considered entitled to a discharge of his debts upon turning over to his creditors all of his property, but under our present Federal Bankruptcy Law, which has been in force for the past thirty years, a debtor is entitled by law to retain a certain amount of property which it is thought an honest debtor ought to be allowed to retain against the claims of his creditors. The exact amount is prescribed by the several states, each state deciding for itself the kind as well as the aggregate amount of the exemption; and many of the states are quite liberal in their exemp-In this liberality the states merely reflect the general opinion of the people of the United States, which found an early expression in the Homestead Movement and Homestead Laws. Sturges v. Crowninshield and Ogden v. Saunders were both decided before the Homestead Movement made its appearance in the political arena of the United States, but after the general ameliorative movement designed to diminish the rigors of the common law against unfortunate debtors had made some headway.

The Constitution of the United States specifically provides that Congress shall have power to pass "uniform bankrupt laws." At the time of the decision of Sturges v. Crowninshield, there was no Federal Bankrupt Law. There had been none for a long time past, nor for a long time thereafter. It is unnecessary to enter here upon the whys and wherefores of this situation. Suffice it to say that it was due mainly to two causes: One was the difficulty of obtaining general agreement on the attitude towards the problem of debtor and creditor during such a transition period. The second cause lay in the fact that, owing to the different economic conditions prevailing in different parts of the country, it was hard to

obtain an agreement as to the specific provisions which ought to go into a Bankrupt Law, even where there was a difference in the basic attitude towards the problem. As a result, the problem was left to the action of state legislatures.

The first problem which arose in this connection was whether the states were at all competent to deal with the subject in view of the provision of the Federal Constitution giving Congress the power to pass uniform bankrupt laws. This question was, however, resolved by the United States Supreme Court favorably to state action. The decision on that point was that in the absence of Federal legislation the states were competent to pass bankrupt laws. Had the decision stopped there, that would have been an end of the matter. But the decision in Sturges v. Crowninshield, as we have seen, proceeded to declare that the power of the states to pass bankrupt laws was subject to the general prohibition against laws "impairing the obligation of contracts." This took the problem out of that brand of constitutional law which deals with the division of power between the Federal Government and the State Governments, and placed it within that field which deals with general or absolute restrains on governmental powers—in this case the restraints upon the governmental powers of the statesthus associating it with the problem dealt with in the Dartmouth College Case. That this problem was of tremendous importance to the people of the United States in view of the absence of Federal legislation on the subject is obvious. And it was of particular importance at this time because of the hard times and money stringency which followed the Panic of 1819.

Let us therefore examine in some detail the manner in which the United States Supreme Court dealt with this problem.

That the judges who seemed to be unanimous in Sturges v. Crowinshield and M'Millan v. M'Neill, were in reality in hopeless disagreement we have already stated. It now remains to say that this disagreement shows the utter unsoundness of the entire theory of the Judicial Power. For upon careful examination it will be found that the disagreement was not so much as to what the Constitution says on the subject—which is a question of the interpretation of the Constitution as a document—but as to the general philosophical, social and economic conceptions or predilections of the various judges. In other words, the division of opinion was in reality upon matters which are concededly within

the sphere of legislators and not of judges. As we have already stated, and as we shall again have occasion to show further on, this is practically always the case whenever there is a difference of opinion among the judges of the United States Supreme Court, or between one set of judges and another, in this domain of our constitutional law. The only thing exceptional about this case lies in its being, we believe, the only instance on record where the judges of the United States Supreme Court have expressly admitted their decision to be in the nature of legislation rather than of constitutional interpretation.

A reading of the opinions in the various cases for a full century, commencing with Ogden v. Saunders in 1827 up to Tyson v. Banton in 1927, will clearly demonstrate that in every great constitutional decision the judges, instead of following the Constitution, were really making it over anew, each judge putting into the Constitution what he thought ought to be there—usually what he brought with him out of his environment when he ascended the Bench. In some cases, the action was deliberate, in the sense that the judges knew full well that what they were deciding as being already in the Constitution was not there before they put it in there by their decision. That this was actually true in the cases here under consideration will appear from Judge Johnson's opinion quoted below. In other cases, the situation was more complicated: The judges assumed that the things that they were putting into the Constitution were actually there. But this assumption was due to their mental outlook, which required that these things should be in a perfect constitution coupled with the will to believe that ours was a perfect Constitution.

Incidentally, an examination of the cases here under consideration proves conclusively the utter absurdity of the claim that the Constitution as a *legal* document furnishes a sure guide to governmental action; and the history of our constitutional law for the following one hundred years proves it over and over again.

The official theory of the Judicial Power is that the United States Constitution is in itself clear and its meaning beyond dispute. Many of the judges of the Supreme Court have said so in their official opinions. Indeed it is part of this theory of the Judicial Power that the courts cannot declare a law unconstitutional unless its unconstitutionality is beyond all doubt. To arrive at

with a constitutional provision whose meaning must be beyond dispute. Let us see how this part of our official theory met its first great test in Sturges v. Crowninshield—Ogden v. Saunders. It will be recalled that in Sturges v. Crowninshield the Supreme Court decided with apparent unanimity that in so far as a state bankrupt law assumes to discharge the debtor from debts incurred prior to its enactment, it impairs the obligation of contracts; and that in M'Millan v. M'Neill, the court apparently decided that the same is true with respect to debts incurred after the passage of the bankruptcy law. We are now informed that we were in error as to what was decided in M'Millan v. M'Neill, and as to the unanimity of the Supreme Court in Sturges v. Crowinshield. Mr. Justice Washington, who wrote what might be called the "leading" opinion in Ogden v. Saunders, opens the discussion as follows:

"The first and most important point to be decided in this cause turns essentially upon the question, whether the obligation of a contract is impaired by a state bankrupt or insolvent law, which discharges the person and the future acquisitions of the debtor from his liability under a contract entered into in that state after the passage of the act.

"This question has never before been distinctly presented to the consideration of this court and decided, although it has been supposed by the judges of a highly respectable state court, that it

was decided in the case of M'Millan v. M'Neill."

"It has constantly appeared to me—continues Judge Washing-ton—throughout the different investigations of this question, to which it has been my duty to attend, that the error of those who controvert the constitutionality of the bankrupt law under consideration in its application to this case, if they be in error at all, has arisen from not distinguishing accurately between a law which impairs a contract, and one which impairs its obligation. A contract is defined by all to be an agreement to do, or not to do, some particular act; and in the construction of this agreement, depending essentially upon the will of the parties between whom it is formed, we seek for their intention with a view to fulfill it. . . .

"This leads us to a critical examination of the particular phraseology of that part of the above section which relates to contracts. It is a law which impairs the *obligation* of contracts, and not the contracts themselves, which is interdicted. It is not to be doubted, that this term, obligation, when applied to contracts, was well considered and weighed by those who framed the constitution, and was intended to convey a different meaning from what the prohibition would have imported without it. It is this meaning of

which we are all in search.

"What is it, then, which constitutes the obligation of a contract? The answer is given by the Chief Justice, in the case of Sturges v. Crowninshield, to which I readily assent now, as I did then; it is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation, must govern and control the contract in every shape in which it is intended to bear upon it, whether it affect its validity, construction, or discharge. . . .

"It is, then, the municipal law of the state, whether that be written or unwritten, which is emphatically the law of the contract made within the state, and must govern it throughout, wher-

ever its performance is sought to be enforced.

"It forms, in my humble opinion, a part of the contract, and travels with it wherever the parties to it may be found. It is so regarded by all the civilized nations of the world, and is enforced by the tribunals of those nations according to its own forms, unless the parties to it have otherwise agreed, as where the contract is to be executed in, or refers to the laws of, some other country than that in which it is formed, or where it is of an immoral character, or contravenes the policy of the nation to whose tribunals the appeal is made; in which latter cases, the remedy which the comity of nations affords for enforcing the obligation of contracts wherever formed, is denied. Free from these objections, this law, which accompanies the contract, as forming a part of it, is regarded and enforced everywhere, whether it affect the validity, construction, or discharge of the contract. . .

"To the decision of this court, made in the case of Sturges v. Crowninshield, and to the reasoning of the learned judge who delivered that opinion, I entirely submit; although I did not then, nor can I now bring my mind to concur in that part of it which admits the constitutional power of the state legislatures to pass bankrupt laws, by which I understand, those laws which discharge the person and the future acquisitions of the bankrupt from his debts. I have always thought that the power to pass such a law was exclusively vested by the constitution in the legislature of the United States. But it becomes me to believe that this opinion was, and is incorrect, since it stands condemned by the

decision of a majority of this court, solemnly pronounced.

"After making this acknowledgment, I refer again to the above decision with some degree of confidence, in support of the opinion to which I am now inclined to come, that a bankrupt law, which operates prospectively, or in so far as it does so operate, does not violate the constitution of the United States. It is there stated, 'that, until the power to pass uniform laws on the subject of bankruptcies be exercised by Congress, the states are not forbidden to

pass a bankrupt law, provided it contain no principle which violates the tenth section of the first article of the constitution of the United States.' The question in that case was, whether the law of New York, passed on the third of April, 1811, which liberates, not only the person of the debtor, but discharges him from all liability for any debt contracted previous, as well as subsequent to his discharge, on his surrendering his property for the use of his creditors, was a valid law under the constitution in its application to a debt contracted prior to its passage? The court decided that it was not, upon the single ground that it impaired the obligation of that contract. And if it be true, that the states cannot pass a similar law to operate upon contracts subsequently entered into, it follows inevitably, either that they cannot pass such laws at all, contrary to express declaration of the court, as before quoted, or that such laws do not impair the obligation of contracts subsequently entered into; in fine, it is a self-evident proposition, that every contract that can be formed, must either precede, or follow, any law by which it may be affected."

Stripped of its technical language, Judge Washington's opinion comes to this:

First: He is of the opinion that under the United States Constitution, state legislatures have no right to pass any bankrupt laws at all—that power having been vested exclusively in Congress. But this opinion of his must be erroneous—"since it stands condemned by the decision of a majority" of the United States Supreme Court.

Second: That he bases his opinion in the present case on the decision in Sturges v. Crowninshield, in which Chief Justice Mar-

shall delivered the opinion of the court.

Third: That since by that decision it was authoritatively held that the states have a right to pass bankrupt laws, that decision must have some meaning. That is to say, there must be some kind of law in the nature of a bankrupt law which does not impair

the obligation of contracts.

Fourth: That since every contract either precedes the bankrupt law or follows it, and since he cannot find any other principle which might divide bankrupt laws into such as impair the obligation of contracts and such as do not except the principle based upon their being either precedent or subsequent to the passage of the bankrupt law, it must be assumed that that question is the pivotal point upon which the constitutionality or unconstitutionality of a bankrupt law must depend. Fifth: Since, therefore, it has been decided in Sturges v. Crown-inshield that a bankrupt law which discharges a debt contracted before the passage of the law impairs the obligation of contracts, it must necessarily follow that in so far as such a law discharges only debts contracted after the passage of the law, it does not impair the obligation of contracts.

Sixth: That the reason for this distinction is, that the law in existence at the time of the making of the contract is a part of the contract itself and the obligation of the contract is to perform it in accordance with the then existing law. Where, therefore, the bankrupt law was in existence at the time the debt was incurred, the bankrupt law was itself a part of the law which entered into the obligation of the contract, and its discharge in accordance with such bankrupt law is therefore not an impairment of its obligation.

The last point, which is the essence of Judge Washington's theory on the subject, is of importance not only from the purely technical legal point of view, but also from the moral point of view. In their discussions of the subject, those attacking the constitutionality of bankrupt or other ameliorative laws, constantly appeal to the immorality of discharging a contract otherwise than according to the rigors of the law in existence at the time it was entered into. It is claimed that when a contract is made, or credit extended, the one who enters into the contract, or extends the credit, relies upon the existing law for the enforcement of the one and the collection of the other. Therefore, to diminish the force of that law is to work an injustice, if not actually a fraud, upon the creditor or contractee. This moral law is then converted into a legal principle which is supposed to be covered by the constitutional provision against the impairment of the obligation of contracts. This appeal to the ethics of the situation is now turned by Justice Washington in support of his legal theory. The argument is unanswerable. Clearly, if there is any force in this appeal to morality it should now be used as a shield to protect the debtor just as it was used in Sturges v. Crowninshield as a sword to fight for the creditor. Since, in the present case, the creditor in extending the credit, or entering into the contract, knew, and in fact agreed, that the contract or debt might be discharged in the very way in which it is now sought to have it discharged.

Judge Washington's claim that his decision is in accordance

with Marshall's opinion in Sturges v. Crowninshield is fully justified, at least as far as the spirit of that opinion is concerned, for in that opinion Marshall said:

"It has been contended, that as a contract can only bind a man to pay to the full extent of his property, it is an implied condition

that he may be discharged on surrendering the whole of it.

"But it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents and integrity, constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation."

But, clearly, if the expectations of the parties at the time of entering into the contract, and their reliance and trust, are to determine the question, a bankrupt law cannot possibly impair the obligation of the contract made when it was already on the statute book, since the parties must have contracted with a view to that law, and could not have relied upon any other means of enforcement of the contract and collection of the debt except such as were then provided by law, which included its discharge in the manner provided by that law. And the debtor had as much right to rely upon the provisions for its discharge contained in the existing law as the creditor on the provisions for its enforcement.

Justice Thompson, in a separate concurring opinion, takes the same position on the main question as that taken by Mr. Justice Washington. He differs, however, from Judge Washington on the question as to whether or not bankrupt laws can be said at all to impair the obligation of contracts. In his opinion, which he supports by a very learned review of the history of the country, the provision of the United States Constitution against state laws impairing the obligations of contracts has absolutely nothing to do with bankrupt laws, and was intended to cover an entirely differ-

ent class of cases.

Justice Trimble, in a separate concurring opinion, disagrees with Judges Washington and Thompson that the law in existence at the time of the making of the contract enters into and forms a part of it. He agrees, however, with their conclusion that the law under consideration is not unconstitutional. His opinion is mainly interesting to the student of our constitutional law as showing

what might be called the extra-constitutional considerations which enter into the decisions of constitutional questions. It proves our oft-repeated assertion that each judge tries to put into the Constitution his own conception of history, law, politics, and of everything else that goes into the making of what are commonly called "social and political opinions."

The salient points of Judge Trimble's opinion, in so far as they

affect the subject here under consideration are as follows:

"I conclude—says he—that, so far as relates to private contracts between individual and individual, it is the civil obligation of contracts; that obligation which is recognized by, and results from, the law of the state in which the contract is made, which is within the meaning of the constitution. If so, it follows that the states have, since the adoption of the constitution, the authority to prescribe and declare, by their laws, prospectively, what shall be the obligation of all contracts made within them. Such a power seems to be almost indispensable to the very existence of the states, and is necessary to the safety and welfare of the people. . . .

"It has often been said that the laws of a state in which a contract is made, enter into, and make part of the contract; and some who have advocated the constitutionality of prospective laws of the character now under consideration, have placed the question on that ground. The advocates of the other side, availing themselves of the infirmity of this argument, have answered triumphantly, 'admitting this to be so, the constitution is the supreme law of every state, and must, therefore, upon the same principle, enter into every contract, and overrule the local laws.' My answer to this view of both sides of the question is, that the argument, and the answer to it, are equally destitute of truth."

Judge Trimble then proceeds to state why, in his opinion, there nevertheless is a difference between pre-existing contracts and contracts entered into subsequent to the passage of the law in question, which makes the law unconstitutional as to the first but constitutional as to the second:

"The true and only reason—says he—is, that they operate on contracts made after the passage of the laws, and not upon existing contracts. And hence the Chief Justice very properly remarks, of both usury laws, and laws of limitation, in delivering the opinion in Sturges v. Crowninshield, that if they should be made to operate upon contracts already entered into, they would be unconstitutional and void. If a statute of frauds and perjuries should pass in a state formerly having no such laws, purporting to operate upon existing contracts, as well as upon those made after

its passage, could it be doubted, that so far as the law applied to, and operated upon, existing contracts, it would be a law 'impairing the obligation of contracts?' Here, then, we have the true reason and principle of the constitution. The great principle intended to be established by the constitution, was the inviolability of the obligation of contracts, as the obligation existed and was recognized by the laws in force at the time the contracts were made."

It will be noted that the quarrel between Judge Trimble on the one hand, and Judges Washington and Thompson on the other, seems to be a purely metaphysical one; or rather, one based on the splitting of logical hairs. But the reasons behind this apparent hair-splitting were very real and substantial. Judge Trimble was undoubtedly correct when he said that those who insist that the law in existence at the time of the making of a contract forms a part of the contract are in a very weak position. And the fact that this position leads to many logical absurdities, is not the most important of its weaknesses. It is a very dangerous one, as is shown by Chief Justice Marshall in his dissenting opinion, which will be considered further below. There is, however, only one way of escaping the legal absurdities involved in that position and the dangers flowing from that doctrine, and that is to boldly admit that the constitutional provision in question does not refer to remedial legislation. But Judge Trimble was too much steeped in the legal and social theories of an already superseded age to be able to emancipate himself from the notion that certain contracts at least have a sanctity which cannot be reached by remedial legislation. So he flounders hopelessly around, as can be seen from the following passages of his opinion:

"I do not mean to say,—says he—that every alteration of the existing remedies would impair the obligation of contracts; but I do say, with great confidence, that a law taking away all remedy from existing contracts, would be, manifestly, a law impairing the obligation of contracts. . . . On the other hand, a great variety of instances may readily be imagined in which the legislature of a state might alter, modify, or repeal existing remedies, and enact others in their stead without the slightest ground for a supposition that the new law impaired the obligation of contracts. If there be intermediate cases of a more doubtful character, it will be time enough to decide them when they arise."

It would seem that the time to solve the great problem which the learned Justice was discussing, was the time when he was discussing it. "Time enough" was clearly what is colloquially called "an alibi"—a mere expedient by which to extricate himself temporarily at least from a hopelessly confused situation, due to his perceiving the weakness of general position, while lacking the courage to take the only way out."

The only judge who had the vision to see through the fog of legalistic verbiage and the mist of seventeenth and eighteenth century socio-philosophic notions, was Judge Johnson. He also had the rare courage of stating publicly things which are usually con-

fined to the secrecy of the judges' consultation room.

After adverting to the decisions in Sturges v. Crowninshield and M'Millan v. M'Neill, and to the fact that Sturges v. Crowninshield should have definitely settled the question of the power of the states to pass bankrupt laws, he said:

"I should therefore have supposed that the question of exclusive power in Congress to pass a bankrupt law was not now open; but it has been often glanced at in argument, and I have no objection to express my individual opinion upon it. Not having recorded my views on this point in the case of Crowninshield, I

avail myself of this occasion to do so.

"So far, then, am I from admitting that the constitution affords any ground for this doctrine, that I never had a doubt, that the leading object of the constitution was to bring in aid of the states a power over this subject which their individual powers never could attain to; so far from limiting, modifying, and attenuating legislative power in its known and ordinary exercise in favor of unfortunate debtors, that its sole object was to extend and perfect it, as far as the combined powers of the states, represented by the general government, could extend it. Without that provision, no power would have existed that could extend a dis-

It would seem that a mere perusal of the text of the United States Constitution should be sufficient to convince anyone that the provision against impairment of the obligation of contracts has no reference whatever to bankruptcy laws. And the reading of the records of the Constitutional Convention put the question beyond the shadow of a doubt. The clause was inserted at the last moment practically without any discussion. It is clear from the manner in which this clause was adopted that the Framers had in mind an evil which was both notorious and morally reprehensible. But, clearly, neither of these things could be said of bankruptcy laws. See Judge Hitchcock's article on bankruptcy laws, reproduced at the end of with respect to bankruptcy legislation. Also, the fact that Congress was specifically given the power to pass bankruptcy laws clearly shows that bankruptcy laws were not considered morally reprehensible by the Framers.

charge beyond the limits of the state in which it was given, but with that provision it might be made co-extensive with the United States. This was conducing to one of the great ends of the constitution, one which it never loses sight of in any of its provisions—that of making an American citizen as free in one state as he was in another. And when we are told that this instrument is to be construed with a view to its federative objects, I reply that this view alone of the subject is in accordance with its federative character. . . .

"Let any one turn his eye back to the time when this grant was made, and say if the situation of the people admitted of an abandonment of a power so familiar to the jurisprudence of every state; so universally sustained in its reasonable exercise, by the opinion and practice of mankind, and so vitally important to a people overwhelmed in debt, and urged to enterprise by the activity of mind that is generated by revolutions and free governments.

"I will with confidence affirm, that the constitution had never been adopted, had it then been imagined that this question would ever have been made, or that the exercise of this power in the states should ever have depended upon the views of the tribunals to

which that constitution was about to give existence. . . .

"With regard to the universal understanding of the American people on this subject, there cannot be two opinions. If ever contemporaneous exposition, and the clear understanding of the contracting parties, or of the legislating power (it is no matter in which light it be considered), could be resorted to as the means of expounding an instrument, the continuing and unimpaired existence of this power in the states ought never to have been controverted. Nor was it controverted until the repeal of the bankrupt act of 1800, or until a state of things arose in which the means of compelling a resort to the exercise of this power by the United States became a subject of much interest. Previously to that period, the states remained in the peaceable exercise of this power, under circumstances entitled to great consideration. In every state in the Union was the adoption of the constitution resisted by men of the keenest and most comprehensive minds; and if an argument, such as this, so calculated to fasten on the minds of a people, jealous of state rights, and deeply involved in debt, could have been imagined, it never would have escaped them. Yet nowhere does it appear to have been thought of; and, after adopting the constitution, in every part of the Union, we find the very framers of it everywhere among the leading men in public life, and legislating or adjudicating under the most solemn oath to maintain the constitution of the United States, yet nowhere imagining that, in the exercise of this power, they violated their oaths, or transcended their rights. . . . With regard to their bankrupt

or insolvent laws, they went on carrying them into effect and abrogating, and re-enacting them, without a doubt of their full and unimpaired power over the subject. Finally, when the bankrupt law of 1800 was enacted, the only power that seemed interested in denying the right to the states, formally pronounced a full and absolute recognition of that right. It is impossible for language to be more full and explicit on the subject, than is the sixth section of this act of Congress. It acknowledges both the validity of existing laws, and the right of passing future laws. The practical construction given by that act to the constitution is precisely this, that it amounts only to a right to assume the power to legislate on the subject, and, therefore, abrogates or suspends the existing laws, only so far as they may clash with the provisions of the act of Congress. This construction was universally acquiesced in, for it was that on which there had previously prevailed but one opinion from the date of the constitution. . . .

"We will next inquire whether the states are precluded from the exercise of this power by that clause in the constitution which declares that no state shall 'pass any bill of attainder, ex post facto

law, or law impairing the obligation of contracts.'

"This law of the state of New York is supposed to have violated the obligation of a contract, by releasing Ogden from a debt which he had not satisfied; and the decision turns upon the question, first, in what consists the obligation of a contract? and, second, whether the act of New York will amount to a violation of that obligation, in the sense of the constitution.

"The first of these questions has been so often examined and considered in this and other courts of the United States, and so little progress has yet been made in fixing the precise meaning of the words 'obligation of a contract,' that I should turn in despair from the inquiry, were I not convinced that the difficulties the question presents are mostly factitious, and the result of refine-

ment and technicality. . . .

"Right and obligation are considered by all ethical writers as correlative terms: Whatever I by my contract give another a right to require of me, I by that act lay myself under an obligation to yield or bestow. The obligations of every contract will then consist of that right or power over my will or actions, which I, by my contract, confer on another. And that right and power will be found to be measured neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three—an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law. The constitution was framed for society, and an advanced state of society, in which I will undertake to say that all the contracts of men receive a relative, and not a positive interpretation: for the rights of all must

be held and enjoyed in subserviency to the good of the whole. The state construes them, the state applies them, the state controls them, and the state decides how far the social exercise of the rights they give us over each other can be justly asserted."

Then, evidently having in mind Chief Justice Marshall's dissenting opinion, which so strongly appeals to natural law in connection with contracts, an opinion which was evidently of great influence over the majority of the court, and from which possibly Judge Johnson himself could not entirely free himself, Mr. Justice Johnson refers to the supposed obligation of contracts in a "state of nature"; and, after having laid down the supposed obligation of a contract between A and B on a desert island, he observes:

"But if it should appear that B, by sickness, by accident, or circumstances beyond human control, however superinduced, could not possibly comply with his contract, the decision would be otherwise, and the exercise of compulsory power over B would be followed with the indignation of mankind. He has carried the power conferred on him over the will or actions of another beyond their legitimate extent, and done injustice in his turn. 'Summum jus est summa injuria.'"

Then, turning again to the question of contract within society, he proceeds thus:

"The public duty, in this respect, is the substitute for that right which they possessed in a state of nature, to enforce a fulfillment of contracts; and if, even in a state of nature, limits were prescribed by the reason and nature of things, to the exercise of individual power in enacting the fulfillment of contracts, much more will they be in a state of society. For it is among the duties of society to enforce the rights of humanity; and both the debtor and the society have their interests in the administration of justice, and in the general good; interests which must not be swallowed up and lost sight of while yielding attention to the claim of the creditor. The debtor may plead the visitations of Providence, and the society has an interest in preserving every member of the community from despondency—in relieving him from a hopeless state of prostration, in which he would be useless to himself, his family, and the community. When that state of things has arrived in which the community has fairly and fully discharged its duties to the creditor, and in which, pursuing the debtor any longer would destroy the one, without benefiting the other, must always be a question to be determined by the common guardian of the rights of both; and in this originates the power exercised

by governments in favor of insolvents. It grows out of the ad-

ministration of justice, and is a necessary appendage to it.

"There was a time when a different idea prevailed, and then it was supposed that the rights of the creditor required the sale of the debtor, and his family. A similar notion now prevails on the coast of Africa, and is often exercised there by brute force. It is worthy only of the country in which it now exists, and of that

state of society in which it once originated and prevailed.

"'Lex non cogit ad impossibilia,' is a maxim applied by law to the contracts of parties in a hundred ways. And where is the objection, in a moral or political view, to applying it to the exercise of the power to relieve insolvents? It is in analogy with this maxim, that the power to relieve them is exercised; and if it never was imagined, that, in other cases, this maxim violated the obligation of contracts, I see no reason why the fair, ordinary, and reasonable exercise of it in this instance, should be subjected to that imputation. . . .

"I must not be understood here as reasoning upon the assumption that the remedy is grafted into the contract. I hold the doctrine untenable, and infinitely more restrictive on state power than the doctrine contended for by the opposite party. Since, if the remedy enters into the contract, then the states lose all power

to alter their laws for the administration of justice. . . .

"To assign to contracts, universally, a literal purport, and to exact for them a rigid literal fulfillment, could not have been the intent of the constitution. It is repelled by a hundred examples. Societies exercise a positive control as well over the inception, construction, and fulfillment of contracts, as over the form and meas-

ure of the remedy to enforce them. . .

"For instances of discretion exercised in applying the remedy, take the time for which executors are exempted from suit; the exemption of members of legislatures; of judges; of persons attending courts, or going to elections; the preferences given in the marshaling of assets; sales on credit for a present debt; shutting of courts altogether against gaming debts and usurious contracts, and above all, acts of limitation. I hold it impossible to maintain the constitutionality of an act of limitation, if the modification of the remedy against debtors, implied in the discharge of insolvents, is unconstitutional. I have seen no distinction between the cases that can bear examination. . . .

"Yet so universal is the assent of mankind in favor of limitation acts, that it is the opinion of profound politicians, that no

nation could subsist without one.

"The right, then, of the creditor, to the aid of the public arm for the recovery of contracts, is not absolute and unlimited, but may be modified by the necessities or policy of societies. And this, together with the contract itself, must be taken by the individual, subject to such restrictions and conditions as are imposed by the laws of the country. The right to pass bankrupt laws is asserted by every civilized nation in the world. And in no writer, I will venture to say, has it ever been suggested, that the power of annulling such contracts, universally exercised under their bankrupt or insolvent systems, involves a violation of the obligation of contracts. In international law, the subject is perfectly understood, and the right generally acquiesced in; and yet the denial of justice is, by the same code, an acknowledged cause of war."

Then, evidently alluding to Chief Justice Marshall's argument in Sturges v. Crowninshield, Judge Johnson adds:

"If it be urged . . . that parties have in view something more than present possessions, that they look to future acquisitions, that industry, talents and integrity are as confidently trusted as property itself; and, to release them from this liability, impairs the obligation of contracts; plausible as the argument may seem,

I think the answer is obvious and incontrovertible.

"Why may not the community set bounds to the will of the contracting parties in this as in every other instance? That will is controlled in the instances of gaming debts, usurious contracts, marriage, brokerage bonds, and various others; and why may not the community also declare that, look to what you will, no contract formed within the territory which we govern shall be valid as against future acquisitions'; we have an interest in the happiness, and services, and families of this community, which shall not be superseded by individual views?' Who can doubt the power of the state to prohibit her citizens from running in debt altogether? A measure a thousand times wiser than that impulse to speculation and ruin, which has hitherto been communicated to individuals by our public policy. And if to be prohibited altogether, where is the limit which may be set both to the acts and the views of the contracting parties? . . .

"No one questions the duty of the government to protect and enforce the just rights of every individual over all within its control. What we contend for is no more than this, that it is equally the duty and right of governments to impose limits to the avarice and tyranny of individuals, so as not to suffer oppression to be

exercised under the semblance of right and justice."

Mr. Justice Johnson realized that his arguments went far beyond the requirements of this case, and that it applied to the situation in Sturges v. Crowninshield with the same force as to the situation presented in Ogden v. Saunders. And he made it quite clear that he intended to go the whole hog, and to knock out the foundations from under the decision in Sturges v. Crowninshield, while

attacking the position of the minority in Ogden v. Saunders. In this respect, he evidently took issue with his brethren of the majority, who thought that it was incumbent upon them to submit to the decision in Sturges v. Crowninshield even though they might consider that decision wrong.

We have seen that Justice Washington disagreed with that portion of the decision in Sturges v. Crowninshield which held that the power of Congress with respect to bankruptcy laws was not exclusive, but that he deemed it his duty to consider himself in the wrong, even though he had not changed his opinion on the subject. Judges Thompson and Trimble, who were not members of the court when Sturges v. Crowninshield was decided, evidently felt it their duty, in deference to the prevailing official theory that the majority of the Supreme Court cannot possibly be wrong, to find a principle whereby they might sustain the decision in Sturges v. Crowninshield without extending it to Ogden v. Saunders.

It is for this reason that they were compelled to invent distinctions that do not distinguish, and which could not stand a moment's critical examination—and which were therefore easily disposed of by Marshall speaking for the minority, as well as by Johnson who was part of the majority. Judge Johnson, however, felt no obligation to sustain the authority in Sturges v. Crownin-shield, and we shall shortly see why. So, he declared frankly that he did not intend to sustain that decision.

"If it be objected to these views of the subject,—says Judge Johnson—that they are as applicable to contracts prior to the law, as to those posterior to it, and, therefore, inconsistent with the decision in the case of Sturges v. Crowninshield, my reply is, that I think this no objection to its correctness. I entertained this opinion then, and have seen no reason to doubt it since. But if applicable to the case of prior debts, multo fortiori, will it be so to those contracted subsequent to such a law; the posterior date of the contract removes all doubt of its being in the fair and unexceptionable administration of justice that the discharge is awarded."

But if Judge Johnson was of the same opinion at the time of the decision in *Sturges v. Crowninshield*, why did he not dissent from that decision? Why did he permit that decision to go forth as the decision of a unanimous court?

This brings us to one of the most astounding statements ever

penned as part of an official opinion of a judge of the United States Supreme Court.

"The report of the case of Sturges v. Crowninshield—says Judge Johnson-needs also some explanation. The court was, in that case, greatly divided in their views of the doctrine, and the judgment partakes as much of a compromise, as of a legal adjudication. The minority thought it better to yield something than risk the whole. And, although their course of reasoning led them to the general maintenance of the state power over the subject, controlled and limited alone by the oath administered to all their public functionaries to maintain the constitution of the United States, yet, as denying the power to act upon anterior contracts, could do no harm, but, in fact, imposed a restriction conceived in the true spirit of the constitution, they were satisfied to acquiesce in it, provided the decision were so guarded as to secure the power over posterior contracts, as well from the positive terms of the adjudication, as from inferences deducible from the reasoning of the court." 3

In other words, a minority of the court who sat in Sturges v. Crowninshield did not believe that the decision in that case was right, and believed that the New York law which was in that case held unconstitutional was in fact constitutional. Marshall, on the other hand, as we know from his opinion in Ogden v. Saunders, was of the opinion that this class of legislation was unconstitutional with respect to both anterior and posterior contracts; and the minority feared that he might carry the majority of the court with him, if the issue were squarely drawn according to the requirements of the constitutional problem and of the legal principles involved. A compromise was thereupon arranged that the minority would refrain from dissenting and giving an exposition of the Constitution as they understood it, if the majority would limit their decision to holding the laws in question unconstitutional only with respect to anterior contracts. And as a result of this compromise the decision in Sturges v. Crowninshield went forth to the world as the unanimous opinion of the United States Supreme Court, and an "authoritative" in-

³ Judge Johnson was entirely wrong in asserting that there was no harm in the decision of Sturges v. Crowninshield "as limited." Both history and logic are against him. Nor is his reference to the "spirit" of the Constitution tenable. It is clear that he was merely offering an apology for his weakness in entering into a compromise whereby he sacrificed a principle for supposed expediency. As is usual in such cases, he made the sacrifice and his opponents profited by the expediency.

terpretation of the Constitution was announced in which no member of the Court really believed.

Then came Ogden v. Saunders, and Chief Justice Marshall and Judge Story abandoned the compromise agreement with the minority in Sturges v. Crowninshield and attempted again to bring the application of bankrupt laws to posterior contracts under the ban of unconstitutionality. Mr. Justice Johnson evidently thought that this action amounted to a breach of faith, and he therefore considered himself released of the obligations of the compromise on his part. So he fell back on the right which he had in his "natural state," before he had assumed the obligations of the compromise contract, to give his own views of the Constitution. In so doing, he was obliged to tell the true story of Sturges v. Crowninshield, and to reveal the fact that that celebrated decision was really not an exposition of the Constitution, but an act of legislation, or, rather of constitution-making. His only excuse being that he consented to this act of constitution-making because he believed that the restrictions upon the States which the Court was imposing by its decision in Sturges v. Crowninshield could not do much harm, and although not contained in the Constitution was, nevertheless, "conceived in the true spirit of the constitution."

This is the only instance we know where such a frank avowal was made by one who was a party to such a transaction. But a study of the decisions of the United States Supreme Court inevitably leads to the conclusion that this is the regular modus operandi in the decision of constitutional questions by the United States Supreme Court, and, in fact, by all other courts as far as constitution-making is concerned. The courts do not always examine the Constitution with a view to finding what it contains. This is often impossible, for many of the questions which come up before the courts had not even been dreamed of by the Framers of the Constitution, and there is nothing in the Constitution one way or another. But since the courts have the power to declare what the Constitution contains, they decide for themselves what would be "in the spirit of the Constitution," and then they put it into the Constitution by officially declaring that they have found it there after very careful examination.

As we have already had occasion to remark, this mode of treating the Constitution is sometimes conscious, and sometimes quite

unconscious. The judge having come to the conclusion that a certain measure is conducive to the welfare of the nation, or that another is dangerous to that welfare, concludes, by a process of self-deception well known to psychologists, that in the one case the power to enact the measure is actually given by the Constitution, and in the other that the Constitution contains a prohibition against it. In the "instant case," as the lawyers say, the process was evidently conscious. But we know of the fact that it was conscious only through Mr. Justice Johnson telling tales out of school.

Chief Justice Marshall delivered the opinion of the minority, consisting of himself and Justices Duval and Story. He carefully refrained from touching upon the history of the decision in Sturges v. Crowninshield. His opinion, in which he maintained that bankrupt laws are unconstitutional with respect to contracts made after their passage as well as with respect to those made before their passage, is one of the poorest ever written by that famous jurist. By comparison with Chief Justice Marshall's opinion, even Mr. Justice Trimble's poor effort shines. Where Mr. Justice Trimble flounders hopelessly in an honest endeavor to reconcile irreconcilables, Chief Justice Marshall turns and twists to face this argument and that, without really meeting a single argument advanced against him. In the process, he manages to state a lot of poor law, and worse history and sociology. Incidentally he advances the truly monstrous doctrine that contracts have a force and sacredness anterior to civil society; a doctrine which, if followed out logically, would make them superior to the laws of civil society, and expose them to all of the objections, and more, which he himself advances against the doctrine which would embody in a contract all the law in existence at the time of its making. His opinion, however, is extremely interesting with respect to what may be called the res gestae of the case. The following excerpts from his opinion contain those portions which we believe to be interesting in connection with the present discussion. Says he:

"The question recurs, what is a law impairing the obligation of contracts? . . .

"We have, then, no hesitation in saying that, however law may act upon contracts, it does not enter into them, and become a part of the agreement. The effect of such a principle would be a mis-

chievous abridgment of legislative power over subjects within the proper jurisdiction of states, by arresting their power to repeal or modify such laws with respect to existing contracts. . . .

"The counsel for the plaintiff in error insist that the right to regulate the remedy and to modify the obligation of the contract are the same; that obligation and remedy are identical, that they

are synonymous—two words conveying the same idea.

"The answer given to this proposition by the defendant's counsel seems to be conclusive. They originate at different times. The obligation to perform is coeval with the undertaking to perform; it originates with the contract itself, and operates anterior to the time of performance. The remedy acts upon a broken contract,

and enforces a pre-existing obligation.

"If there be anything in the observations made in a preceding part of this opinion respecting the source from which contracts derive their obligation, the proposition we are now considering cannot be true. It was shown, we think, satisfactorily, that the right to contract is the attribute of a free agent, and that he may rightfully coerce performance from another free agent who violates his faith. Contracts have, consequently, an intrinsic obligation. When men come into society they can no longer exercise this original and natural right of coercion. It would be incompatible with general peace, and is, therefore, surrendered. Society prohibits the use of private individual coercion, and gives in its place a more safe and more certain remedy. But the right to contract is not surrendered with the right to coerce performance. It is still incident to that degree of free agency which the laws leave to every individual, and the obligation of the contract is a necessary consequence of the right to make it. Laws regulate this right, but, where not regulated, it is retained in its original extent. Obligation and remedy, then, are not identical; they originate at different times, and are derived from different sources.

"The use made of this argument is to show the absurdity and self-contradiction of the construction which maintains the inviolability of obligation, while it leaves the remedy to the state gov-

ernments.

"We do not perceive this absurdity or self-contradiction.

"Our country exhibits the extraordinary spectacle of distinct, and, in many respects, independent governments over the same territory and the same people. The local governments are restrained from impairing the obligation of contracts, but they furnish the remedy to enforce them, and administer that remedy in tribunals constituted by themselves. It has been shown that the voligation is distinct from the remedy, and it would seem to follow that law might act on the remedy without acting on the obligation. To afford a remedy is certainly the high duty of those who

govern to those who are governed. A failure in the performance of this duty subjects the government to the just reproach of the world. But the constitution has not undertaken to enforce its per-

formance. . . .

"We perceive, then, no reason for the opinion that the prohibition 'to pass any law impairing the obligation of contracts' is incompatible with the fair exercise of that discretion, which the state legislatures possess in common with all governments, to regulate the remedies afforded by their own courts. We think that obligation and remedy are distinguishable from each other. . . .

"That the obligation of a contract is not identified with the means which government may furnish to enforce it, and that a prohibition to pass any law impairing it, does not imply a prohibition

to vary the remedy."

Our examination into the voluminous opinions delivered by the learned judges in this case may therefore be summarized as follows:

The unanimity of the United States Supreme Court in Sturges v. Crowninshield was fictitious—in reality the court was hopelessly divided. The decision was, in fact, not a construction of the Constitution, but an act of legislation—or, rather, of constitution-making—deliberately entered into by the judges as the result of a compromise as to what the Constitution should be made into. Chief Justice Marshall was less than frank when he said in his opinion in Sturges v. Crowninshield, "The words of the constitution, then, are express and incapable of being misunderstood. They admit of no variety of construction, and are acknowledged to apply to that species of contract, an engagement between man and man for the payment of money, which has been entered into by these parties."

The greatest confusion, doubt, and uncertainty, existed as to the meaning of the provision of the Constitution under consideration. So much so, that Mr. Justice Washington, who delivered the leading opinion of the majority in Ogden v. Saunders, considered the very doubt of the Constitutional question under consideration one of the grounds for the decision. Notwithstanding the fact that by these two celebrated decisions, Sturges v. Crowninshield and Ogden v. Saunders, the law has been forever established as part of our constitutional system that bankrupt and insolvent laws are unconstitutional when they operate on contracts entered into prior to their passage, but are constitutional

with respect to contracts entered into after their passage, a majority of the judges, including Marshall and Story, actually considered such a distinction wholly unsound and unwarranted by the Constitution. Of the judges who sat in Ogden v. Saunders, four united in condemnation of this distinction: Chief Justice Marshall, and Associate Justices Johnson, Duval, and Story. And from Mr. Justice Johnson's recital of the history of the decision in Sturges v. Crowninshield, it would seem that the judges who sat in the decision of that case were unanimous in their condemnation of this distinction as a matter of constitutional interpretation, although they all agreed to it as a matter of compromise by way of legislation or constitution-making.

The following points should also be noted:

The principle that the law in existence at the time of the making of the contract enters into its obligation is condemned by five out of the seven judges who sat in Ogden v. Saunders: Chief Justice Marshall, and Associate Justices Washington, Johnson, Duval, and Story. The Court was practically unanimous in the assertion that the obligation of the contract and its remedy are quite separate and distinct matters. At least four of the judges (Chief Justice Marshall, and Associate Justices Johnson, Duval, and Story), constituting a majority of the Court, expressly so stated, holding that a different conclusion would work irreparable mischief. Mr. Justice Washington, while not stressing the point, implies it in his opinion. Associate Justices Thompson and Trimble did not express themselves on the subject, but from the fact that they did not dissent from the emphatic assertion of this principle by Chief Justice Marshall, it may be assumed that even if they did not quite agree, they at least did not have any strong convictions to the contrary.

We may therefore say that Chief Justice Marshall and at least a large majority of the Supreme Court were of the opinion that the constitutional provision against the impairment of the obligation of contracts by state legislatures, does not prohibit state legislatures from changing from time to time the remedies with respect to the enforcement of contracts.

These points are of the greatest importance historically if we go back to the decision of the Kentucky Court of Appeals on the Kentucky Relief Laws, which led to the "Old Court-New Court" controversy which almost resulted in Civil War. That case was

decided between the decisions of the United States Supreme Court in Sturges v. Crowninshield and Ogden v. Saunders, and there can be no doubt that it was the direct result of the former decision.

The importance of the Kentucky decision does not arise so much from any direct relation to Sturges v. Crowninshield as from its "intrinsic value," so to say, in the history of the Judicial Power. But this "intrinsic value" can be fully understood only when it is discussed in connection with the decision in Sturges v. Crowninshield as amplified and elucidated by the opinions in Ogden v. Saunders.

We have already noted the fact that the Kentucky Court of Appeals was divided in opinion as to how far the Kentucky remedial legislation was unconstitutional: a majority of the court, consisting of Judges Boyle and Owsley, held that these laws were unconstitutional only in so far as they affected pre-existing contracts, while Mr. Justice Mills held that they were unconstitutional as to both pre-existing and subsequent contracts. The Kentucky Court of Appeals thus foreshadowed the division of opinion in the United States Supreme Court as it ultimately appeared in Ogden v. Saunders; the opinion of the majority of the Kentucky Court of Appeals coinciding with that of the majority of the United States Supreme Court, while Mr. Justice Mills was ranged on the side of Chief Justice Marshall and the minority. The only opinion that was not represented in the Kentucky Court of Appeals was that of Mr. Justice Johnson and the original silent minority in Sturges v. Crowninshield.

But while the decision of the Kentucky Court of Appeals resembles the decision of the United States Supreme Court in Ogden v. Saunders, it stands condemned by the opinion of a majority of the Judges who decided the latter case, including Marshall and Story who, as we have seen, expressly condemned the distinction as unsound.

Even more important, however, is the fact that the decision of the Kentucky Court of Appeals has only superficial resemblance to that of the decision of the United States Supreme Court in Ogden v. Saunders. In reality, the decision of the Kentucky Court stands absolutely condemned by the United States Supreme Court, as evidenced by the opinions of five of its judges, and by none more emphatically than by Chief Justice Marshall, speaking for himself and Associate Justices Story and Duval.

It must be remembered that the legislation which the Kentucky Court of Appeals held unconstitutional did not in any way absolve or discharge the debtors from the obligation of their contracts. The laws in question were not bankrupt or insolvent laws. All that they did was to modify the remedy in existence at the time the contracts were entered into, by softening the mode of the enforcement of executions for the sale of the debtor's property. There was no interference with the ultimate collection of the debt, but merely a postponement of the collection, under proper guarantee of ultimate payment, so as not to sacrifice the debtor's property needlessly by a sale at a time when there were practically no buyers, to the unjust enrichment of the creditor who would thus possess himself of the debtor's property for much less than its value.

In condemning this legislation, the Kentucky Court of Appeals not only proceeded upon the theory that the law in existence at the time the contract was entered into forms a part of the contract, but also upon the theory that the obligation of the contract and its remedy are one and the same thing, a proposition expressly condemned by a large majority of the judges of the United States Supreme Court. The decision of the Kentucky Court of Appeals, as summarized in the reporter's head-note, expressly holds that the obligation of a contract consists in its remedy—the two being identical—and that any interference with the debtor's remedy as it existed at the time of the making of the contract constitutes an impairment of its obligation.

Chief Justice Boyle's opinion on the subject, upon which the decision is based, is contained in the following two paragraphs:

"It is then the remedy allowed by law in force at the date of the contract, being that on the faith of which the contract was made which constitutes its obligation; and it consequently results, that the remedy which was allowed by law upon the contract between the parties in this case, on the 19th of November, 1819, the date of the contract, is its obligation.

"Does, then, the act of assembly in question, impair that obligation? By the law as it stood at the date of the contract, the defendants were allowed to replevy the debt but for three months only, and the money, if not then paid, was required to be made of their estate, without further delay; but by the act in question, they are allowed to replevy the debt for two years, or enter into a recognizance for the payment of the money within that time. And

surely it cannot require argument to prove that the latter act impairs the obligation imposed by the former law." (Blair v. Williams, 4 Littell, 34, 46)

And Mr. Justice Owsley, in his concurring opinion, says:

"But by the act in question, it is true, the obligation of the defendants' prior contract has not been entirely destroyed. After the expiration of the replevin allowed by the act, the plaintiff is permitted to sue out an execution, and in possibility might ultimately succeed in coercing the payment of his debt. But during the time of the replevin which is allowed by the act, all pre-existing remedies upon the prior contract are suspended, and the obligation of that contract thereby weakened and impaired. To be in conflict with the constitution, it is not necessary that the act of the legislature should import an actual destruction of the obligation of contracts; it is sufficient that the act imports an impairment of the obligation. If, by the legislative act, the obligation of contracts be in any degree impaired; or, what is the same thing, if the obligation be weakened, or rendered less operative, the constitution is violated, and the act, so far, inoperative. . . .

"But in argument we were told, that to prescribe remedies for the redress of injuries, is a subject which falls exclusively within the sphere of legislative discretion, and that in all well regulated governments, those remedies ought to be modified, altered and changed, so as to suit the condition and exigencies of the community; and it was contended that the constitution ought not to be so construed, as to limit the power of the state legislature, in relation to a subject of such vital importance to the welfare of the

community.

"That to prescribe remedies falls within the province of the legislature, is a proposition which will not be controverted by the court; nor does it follow from anything which we have said, that the legislature may not, according to its discretion, alter and change existing remedies, if by the alteration, the obligation of contracts be not impaired. Agreeable to our notion of what constitutes the obligation of contracts, we acknowledge that as respects remedies upon pre-existing contracts, the constitution of the United States has prescribed limits to the power of the legislatures of the several states." (Lapsley v. Brashears, 4 Littell, 46, 56-57)

And Mr. Justice Mills, who would not agree to the limitation of the unconstitutionality of the laws to anterior contracts, fully agreed with his brethren of the majority that the obligation of the contract and its remedy are identical, and that under the provision of the United States Constitution in question state legislatures

are prohibited from in any way altering the remedies with respect to contracts. Says he:

"If then the contract was tolerated by law, in its inception, and was such an one as the law said should be binding, and the legislature of a state shall say that it shall not be binding, the act would contravene the constitution; and if they take away the remedy, or so protract it, as to render it useless, the constitution is, in a like manner, violated. Any law, therefore, of a state, which declares that legitimate contracts shall not be fufilled according to their terms, or indirectly reaches the same object, must violate the obligation intended by the constitution. . . .

"Such have been the recent decisions of the supreme courts of Tennessee and Missouri; and, it may be added, such is strongly intimated as the opinion of the supreme court of the United States, in the case before cited, of Sturges v. Crowninshield."

We know now that neither the minority nor the majority opinion of the Kentucky Court of Appeals had any justification in anything said in Sturges v. Crowninshield, and that the decision in that case was no warrant for the decision of the Kentucky Court of Appeals with respect to the Kentucky relief legislation. we know that only since the decision in Ogden v. Saunders, which was rendered four years subsequent to the decision of the Kentucky Court of Appeals. In the meantime it had been generally thought that if the decision in Sturges v. Crowninshield did not actually prescribe such decisions as that rendered by the Kentucky Court of Appeals, it at least "strongly intimated" their correctness. It was therefore only natural that those who opposed the decision of the Kentucky Court of Appeals as an attempt to deprive the State legislatures of their right to pass remedial legislation, whether to relieve a specific emergency or for the general welfare of the community, should consider the fight against the Kentucky Court of Appeals merely as an entering wedge, and that the real fight was against the Judicial Power as such, and specifically against the United States Supreme Court as its foremost exponent and representative, as well as the chief seat of its power.

Sturges v. Crowninshield, and the decisions of the state courts which followed it, or for which it was the excuse, were not the only grievance against the United States Supreme Court, in connection with the exposition of the "impairment of obligation" clause of the United States Constitution. There was the famous decision of Fletcher v. Peck, which, although local in its nature

as far as its immediate application was concerned, established a principle which was considered both unjust as well as dangerous. And there was the even more famous decision in the Dartmouth College Case, which was in the same category as Sturges v. Crowninshield, although the implications of that case may not have been fully realized at the time. Another case, less celebrated than either of the two just mentioned—a case, in fact, very little known now, but which must have exerted a powerful influence at the time as a cause of opposition to the United States Supreme Court—was the decision of that court in the case of Green v. Biddle, decided shortly before the decision of the Kentucky Court of Appeals declaring invalid that state's relief legislation. (8 Wheaton, 1; February Term, 1823)

That now forgotten case was of great importance at the time, and excited general interest because it involved the question of titles to land throughout the West. We need not enter into the details of this now forgotten controversy, except to say that it arose from the lax system of land grants by the State of Virginia in its "Western Country," which subsequently became the State of Kentucky. The situation was very serious for the pioneers because of the unsettled condition of titles, and the states struggled for many years to devise a system of remedial legislation which would be just to all concerned. This finally resulted in a law which sought to accomplish this purpose, but which was naturally attacked by those who thought they were better off under the old laws; and the litigation was finally carried to the United States Supreme Court, on the claim that the Kentucky law was contrary to the provision of the United States Constitution with reference to the impairment of the obligation of contracts. This claim was based on the contention that the law violated the socalled "compact" or agreement entered into between the State of Virginia and the State of Kentucky at the time the latter State was formed.

The question whether the United States Supreme Court had jurisdiction over the subject depended on the definition of the word "contract,"—there being a respectable body of legal opinion then and now to the effect that the word "contract" as used in the United States Constitution was not intended to cover such a political instrument as the agreement entered into by the States of Virginia and Kentucky whereby the latter State was created. But

the United States Supreme Court, following Chief Justice Marshall's policy laid down in Fletcher v. Peck and the Dartmouth College Case, extended the meaning of the word "contract" as used in the Constitution so as to give itself jurisdiction over the controversy. And, what is worse, having taken jurisdiction, it proceeded to decide the case in a manner not only unsatisfactory to the people of the State of Kentucky, but hardly consistent with the legal principles applicable to the subject as we understand them today, and strongly reminiscent of the legal verbalism and technical rules of the law of real property inherited by the English Common Law from the days of feudalism.

The opinion of the Court was written by Mr. Justice Washington, and is a poor performance indeed. Mr. Justice Washington was evidently himself conscious of the poor showing he made, for he closes with the following apologetic statement:

"However this may be,—says he—we hold ourselves answerable to God, our consciences and our country, to decide this question according to the dictates of our best judgment, be the consequences of the decision what they may. If we have ventured to entertain a wish as to the result of the investigation which we have laboriously given to the case, it was that it might be favorable to the validity of the laws; our feelings being always on that side of the question, unless the objections to them are fairly and clearly made out."

Mr. Justice Johnson dissented in a very vigorous and well-reasoned opinion. The opening sentence of his opinion is interesting, being evidently designed to let Mr. Justice Washington down easy. Says Mr. Justice Johnson:

"Whoever will candidly weigh the intrinsic difficulties which this case presents, must acknowledge that the questions certified to this court are among those on which any two minds may differ, without incurring the imputation of willful, or precipitate error."

But after this soft beginning, Justice Johnson proceeds to discuss the question in a manner which leaves no doubt of the fact that he at least did not think that there was the slightest justification for the court's decision. And now, reading these decisions after the lapse of more than a century, we cannot help thinking

Even their soft opening carries a condemnation of Judge Washington and the majority of the Court. For, concededly, no law should be declared unconstitutional except in a clear case.

that, while we need not convict Mr. Justice Washington and the majority of his brethren of "willful or precipitate error" because of their decision in that case, we must come to the conclusion that it was due to two grave and cardinal faults in the character of Chief Justice Marshall, which he imparted to his associates so long as he retained ascendency in that court: Namely, a tendency wholly unwarranted by the United States Constitution to extend the jurisdiction of the United States Supreme Court to matters of a wholly local nature, and an innate conservatism in outlook upon social questions. To which should be added a legalistic and verbalistic conception of the law strongly reminiscent of the Middle Ages, cultivated by that court under the influence of Justice Story, Marshall's second-in-command.

The decision in Green v. Biddle had the remarkable effect of uniting for once the political factions in Kentucky which were almost on the verge of Civil War. So much so, that even the judges belonging to the so-called Old Court Party refused to follow the decision, and it was never recognized as law by the Kentucky Courts.

CHAPTER XV

THE MARCH OF JACKSONIAN DEMOCRACY AND THE RETREAT
OF THE COURTS

HILE the rise of Jacksonian Democracy may be wrapped in mystery, the actual content of its "reign" is quite clear and unmistakable. All historians agree that, whatever may have been the intention of the people in electing Jackson, Jackson himself knew exactly what he wanted; and what he wanted, and actually did, was to lead an assault upon the United States Bank and the courts, particularly the Federal courts.

His fight against the United States Bank, in which he was victorious, is well known and can be read in all our history books. But his assault upon the courts, or rather its outcome, is not so well known. It is only natural, in view of our official theory of government, that some historians should attempt to gloss over the assaults upon the courts by one of the most picturesque and independent of Presidents this country has ever had, and one who, in addition, is one of the two putative fathers of the still "great" Democratic Party. The assault was, however, so open and notorious that it could not be completely overlooked, and so we find certain of our history books referring to it, some cursorily and others at considerable length. But all of them treat it as if it were merely an "aberration," and few give its entire history. The student of history, if he does not keep a sharp lookout, is likely to gain the impression that Jackson's assault upon the courts was not only an aberration, but utterly futile, ending in complete defeat. As a matter of fact, the reverse is true. To begin with, the assault upon the courts was not an individual aberration of Andrew Jackson, but part and parcel of the entire upheaval known as the Rise of Jacksonian Democracy: One of the causes that called that Democracy into being, and one of the principal articles in its creed. And instead of being defeated in the attempt, the Jacksonian Democracy was actually victorious in its fight against

the courts. For the time being, at least; that is to say, as long as that Democracy continued in power. And while the victory of Jacksonian Democracy over the courts was not as spectacular as its victory over the United States Bank, it was just as complete and thorough, as far as the nature of the case permitted. The only real difference was with respect to outward manifestations: The victory over the courts lacked that spectacular element which accompanied the victory over the United States Bank. The lack of the spectacular element in the victory of the Jacksonian Democracy over the courts was due, however, to the fact that the courts, unlike the Bank, retreated before the foe, thus avoiding a frontal attack and a complete rout.

The United States Bank, being in its nature a temporary affair, and having refused to accept the terms of its enemy, was utterly destroyed. The Judiciary, being a permanent institution and having accepted the terms upon which it was permitted to share in the government by the Jackson program, was permitted to function on these terms—thereby itself becoming to a certain extent part of the Jacksonian Democracy.

The story of Jackson's victory over the Bank is too well known to need re-telling here. We shall, therefore, refer only to so much of its history as is necessary to explain the attack upon the Judicial Power involved in it. For the attack upon the Bank

was in itself-an attack upon the Judicial Power.

In discussing the history of the First and Second Banks of the United States, we had occasion to refer to the division of opinion as to the constitutionality of these institutions, and also to the fact that their constitutionality was finally adjudicated in the great case of McCulloch v. Maryland. Had the present-day standards of constitutionality prevailed then, the decision in McCulloch v. Maryland should have forever disposed of the question of the Bank's constitutionality. But when the Second Bank applied for a continuance of its charter during Jackson's first term, Jackson boldly took the position that McCulloch v. Maryland did not settle the question of its constitutionality. He contended that under our constitutional system the Supreme Court was a law only unto the Judiciary, but not unto the President or Congress; that Congress and the President were not only authorized by the Constitution to determine each question of constitutionality for themselves, but they were in duty bound to do so, and that in

so doing they had a right to disregard the decisions of the Judiciary.

As we know, this was the position of Jefferson, and, as we have endeavored to show, it was, with but few exceptions, the position of those who framed and adopted the United States Constitution.

But during the thirty-odd years which elapsed between the Virginia and Kentucky Resolutions and the application of the Second Bank for the extension of its charter, much water had flowed under the bridges spanning the Potomac, and a new Nationalism had been born and had grown to maturity. And as part of the new Nationalism, the courts, and particularly the Federal courts—although frequently opposed at various points—had managed to assume a position of leadership in the Nation. This position was quite different from that which they had occupied at the close of the administration of the first Adams—as the organ of a party at war with the majority of the people.

There is a world of difference between the Federal courts which were enforcing the Alien and Sedition Laws, and the United States Supreme Court which was leading the Nation to Continental Empire in the series of decisions running from McCulloch v. Maryland to Gibbons v. Ogden. Had the courts refrained from meddling in spheres which did not properly belong to them, and particularly from thwarting the progress of ameliorative legislation which became necessary in the course of this very national development in which the courts took so prominent a lead, Jacksonian Democracy—had it ever come at all—would probably never have followed in the footsteps of Jeffersonian Democracy in an assault upon the courts. Unfortunately, the courts pursued a different course, with the result that not only was the rise of Jacksonian Democracy inevitable, but it was also inevitable that Jacksonian Democracy should follow in the footsteps of Jeffersonian Democracy by making an assault on the Judicial Power part of its program.

Jackson was, therefore, not satisfied to combat the attempt to re-charter the United States Bank by arguments against its expediency, which would have been quite sufficient to defeat the Bank. He determined to make the fight against the lesser of the two enemies the means of an attack upon the greater enemy of the Democracy. And so he announced that notwithstanding the decision of the United States Supreme Court in *McCulloch v*.

Maryland, he considered the United States Bank unconstitutional. And when Congress passed a bill re-chartering the Bank, he vetoed it in one of the most famous veto messages ever written by a President of the United States—famous, principally, because of its assault upon the United States Judiciary. In this veto message (July 10, 1832, Richardson, Messages of Presidents, Vol. II, pp. 581-582) Jackson boldly reiterated the Jeffersonian creed with respect to the place of the Judiciary in our constitutional system in the following memorable language:

"It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I cannot assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the states can be considered as well settled. So far from this being the case on this subject, an argument against the bank might be based on precedent. One Congress, in 1791, decided in favor of a bank; another, in 1811, decided against it. One Congress, in 1815, decided against a bank; another, in 1816, decided in its favor. Prior to the present Congress, therefore, the precedents drawn from that source were equal. If we resort to the States, the expressions of legislative, judicial, and executive opinions against the bank have been probably to those in its favor as 4 to 1. There is nothing in precedent, therefore, which, if its authority were admitted, ought to weigh in favor of the act before me.

"If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve."

The most important thing about this message is not the fact that it was written by Andrew Jackson, one of the two patron saints of the present-day Democratic Party, which still looks upon Jefferson and Jackson as the two men who best embodied the aspirations of the people, but the fact that it expressed the views of all of the leaders of Jacksonian Democracy, including its great legal and judicial lights. Among others, it expressed the views of Martin Van Buren, who was Jackson's successor as President of the United States, and could have been Marshall's successor as Chief Justice of the United States; and of Roger B. Taney, who actually became Marshall's successor as Chief Justice of the United States. It is a well-known fact that both of these distinguished legal luminaries approved of Jackson's opinions on the subject, and it seems to be fairly well established that Taney actually helped prepare Jackson's veto-message, and he probably penned the particular passages quoted above.

And now as to the retreat. It is not the least objection to the American system of Government by Judiciary that it has in an undue measure the most essential characteristics of all un-Democratic governments—that of being a government of men, that is, a government of chance. The United States Constitution provides for the manner of the appointment of Federal judges, but it does not provide for any manner of their removal except impeachment, which has turned out in practice to be no manner of removal at all—as was proven in the Chase impeachment. As a result, the physical vigor of a candidate for the United States Supreme Court is almost as important as his mental vigor. And the principles by which the Constitution of the United States is interpreted—which means the principles upon which the government of the United States is run-at any particular time, are largely dependent on the accident of the longevity of the men who happen to be members of the August Tribunal.

It is this feature of our governmental system that led to the unseemly squabble about the Judiciary Acts which characterized the first years of the first Jefferson administration, and to the indecisiveness of the victory of Jeffersonian Democracy. Jacksonian Democracy was more fortunate in this respect: Death had come for many judges of the United States Supreme Court during Jackson's administration. With the result that by the end of Jackson's second term, Jacksonian Democracy had conquered that citadel of

conservatism by peaceful, if deathly, penetration. The citadel, manned by Jackson, surrendered; thus rendering unnecessary any frontal attack upon it.

The Retreat of the Courts was announced to the world formally and in unmistakable manner in three decisions rendered during the January, 1837, Term of the Supreme Court—three decisions of the utmost importance in the history of the Judicial Power as well as in the development of the constitutional law of this country, although they are little known outside the rather narrow circle of special students of our constitutional law. The three cases, in the order of their decision and in the reverse order of their importance, were: The Mayor of New York v. Miln (11 Peters, 102); Briscoe v. The Bank of the Commonwealth (11 Peters, 257); and Charles River Bridge v. The Warren Bridge (11 Peters, 420)

These cases had been pending in the Supreme Court for years; one of them for as long as six years. They had come to the Supreme Court after the influence of Jacksonian Democracy had made itself felt in that court, and were not decided before the court had completely succumbed to that influence. Each of the cases was argued more than once. In each case the judges were divided in opinion after the first argument, and a re-argument was ordered in the hope that the new argument, or the delay, might help bring about an agreement. When the cases were finally decided in 1837, five of the seven judges composing the Supreme Court were Jackson appointees, and the Chief Justice, who was presiding in the place of John Marshall, was no other than Roger B. Taney, who, as a member of Jackson's cabinet, had led the assault upon the Judiciary. Judge Story alone remained to carry on the Marshall tradition in its purity, and Judge Thompson was the only other remaining member of the old court.

In the decision of the first two cases all of the judges except Judge Story concurred; while the third case was decided by a vote of five to two, Judge Thompson siding with Judge Story. It is known that Chief Justice Marshall, who had sat at the original hearing of all of the three cases, was of the same opinion as Judge Story. And Judge Story, in his dissenting opinions, invoked the shade of his departed chief in support of his position. But the invocation was of little avail. The Jacksonian Democracy was no

respecter of persons; and the new generation of judges did not know Joseph.

The case of the Mayor of New York v. Miln involved the right of the State of New York to pass certain port regulations—it being claimed that this action collided with the provision of the U.S. Constitution giving to Congress the right to regulate interstate and foreign commerce. The interest of the case lay in the question whether the Supreme Court would sustain, augment, or diminish the force of its famous decision in Gibbons v. Ogden. As is usual in such cases, and as is practically inescapable under our doctrine of stare decisis, each side claimed to be following the principles laid down in Gibbons v. Ogden, and accused the other side of disregarding that decision. The majority insisted that to declare the New York statute under attack unconstitutional would be going beyond Gibbons v. Ogden, while Mr. Justice Story maintained that to sustain that statute would be a retreat from the position of Gibbons v. Ogden. We need not examine here which view was correct. One thing is certain, and that is, that that decision was either a check upon the Marshall-Story forces which prevented them from taking a further step in advance, or an actual retreat from the position won by the Marshall-Story forces in Gibbons v. Ogden. The important point is: That there was a line-up between the Marshall-Story forces on the one hand and the forces of Jacksonian Democracy on the other, and that Jacksonian Democracy carried the day.

The case of Briscoe v. Commonwealth Bank involved one of the series of laws passed by the State of Kentucky as part of the program of remedial legislation which had led to the Old Court-New Court controversy—namely, the constitutionality of the Commonwealth Bank of Kentucky. The particular point of attack was that the organization of this bank offended that provision of the United States Constitution which restrained the states from emitting bills of credit.

One of the last victories won by the Marshall-Story forces was the decision in a case known to fame as Craig v. Missouri, decided in 1830, in which Marshall wrote the opinion. In that case a Missouri statute similar in character and purpose to that under which the Kentucky Bank was organized, came up for the scrutiny of the United States Supreme Court. Marshall managed to rally his forces after his great defeat in Ogden v. Saunders, and had the

Missouri statute declared unconstitutional. At that time four members of the court were survivors of what may be called the "Old Court," while two of the judges were Jackson appointees; and the seventh member, Judge Thompson, belonged to what might be called the Middle Period—having taken his seat after the Heroic Age of the Marshall Court, which commenced with McCulloch v. Maryland and terminated with Gibbons v. Ogden, but before the advent of Jacksonian Democracy.

Justice McLean, a Jackson appointee, wrote a dissenting opinion in that case in which he sounded a warning against that side of the Marshall constitutional doctrine which used the United States Constitution not only as a shield against attacks by the state governments upon the Federal Government, but also as a sword for the purpose of attacking the state governments in matters where the Federal Government is not actually affected by the use which the state governments make of their functions and powers. In this opinion Justice McLean used language which was strongly reminiscent of the position taken by the Virginia Court of Appeal in the famous litigation involved in the case of Martin v. Hunter's Lessees. It will be recalled that the Virginia Court of Appeal took the position that the powers of the Federal Government being concededly limited, those who claimed for it a certain power must prove an affirmative grant by the Constitution; while, since the state governments were originally governments possessing all sovereign power and have by the Constitution only parted with certain of their powers, the presumption is that all powers exercised by them are rightfully exercised until it is affirmatively proven that they have been deprived of that power by the United States Constitution. This was, substantially, Judge McLean's position.

There was, however, a fundamental difference between the two positions: The Virginia court looked with a jealous eye upon the General Government. Not so Mr. Justice McLean. It is particularly the second part of the Virginia position that Mr. Justice McLean was defending. For the Jacksonian Democracy, of which Judge McLean was a part, was, notwithstanding its opposition to the pretensions of the Judiciary, itself part of, or heir to, the Nationalistic Movement. And that movement did not at all look with disfavor upon the power of the Federal Government. All it cared about was that the U. S. Constitution should not be so interpreted as to interfere with the carrying out of the Demo-

cratic program in spheres where the powers of the Federal Government did not penetrate, or in circumstances when the Federal Government was not using the powers granted to it by the Constitution. Mr. Justice McLean said in the Craig Case:

"All questions of power arising under the Constitution of the United States, whether they relate to the federal or a State government, must be considered of great importance. The federal government being formed for certain purposes, is limited in its powers, and can in no case exercise authority where the power has not been delegated. The States are sovereign, with the exception of certain powers, which have been invested in the general government, and inhibited to the States. . . .

"In a State where doubts exist as to the investiture of power, it should not be exercised, but referred to the people; in the general government, should similar doubts arise, the powers should be referred to the States and the people." (Craig v. Missouri, 4 Peters,

410, 463-465)

Mr. Justice McLean then uttered a warning with respect to possible abuses of power. The warning, in form, was to both the federal and the state governments; but in reality it was addressed to the United States Supreme Court, since it was the final arbiter in all questions of the division of power between the federal and state governments.

"That distinct sovereignties—says Mr. Justice McLean—could exist under one government, emanating from the same people, was a phenomenon in the political world which the wisest statesmen in Europe could not comprehend; and of its practicability many in our own country entertained the most serious doubts. Thus far the friends of liberty have had great cause of triumph in the success of the principles upon which our government rests. But all must admit that the purity and permanency of this system depend on its faithful administration. The States and the federal government have their respective orbits, within which each must revolve. If either cross the sphere of the other, the harmony of the system is destroyed, and its strength is impaired. It would be as gross usurpation on the part of the federal government to interfere with State rights by an exercise of powers not delegated, as it would be for a State to interpose its authority against a law of

As the contest in The Mayor of New York v. Miln took on the form of an interpretation of the true principles laid down in Gibbons v. Ogden, so the contest in Briscoe v. Bank of the Commonwealth took on the form of a dispute as to the true meaning of the decision in Craig v. Missouri. But this was purely a matter of form. It cannot be said that the judges who composed the majority in the latter case were particularly anxious to defend the principles of the earlier case. In this respect the case of Briscoe v. The Bank was somewhat different from the case of New York v. Miln. Gibbons v. Ogden undoubtedly decided a principle vital to the Federal Government and the proper exercise of its functions. All of the judges who sat in New York v. Miln, were, therefore, genuinely anxious to maintain that principle, at least in substance. Whether the majority really believed that to declare the New York statute unconstitutional would be an unwarranted extension of the rules laid down in Gibbons v. Ogden, or were of the opinion that the decision in Gibbons v. Ogden was laid down in too general terms is a debatable question. But there can be no doubt of the fact that the majority was as anxious to preserve the basic principle announced in Gibbons v. Ogden as it was that that principle should not be misused. On the other hand, the decision in Craig v. Missouri was undoubtedly considered by a majority of the court who sat in Briscoe v. Commonwealth Bank as erroneous and an unnecessary interference with the powers of the state governments. They therefore show little anxiety to protect Marshall's decision in the Craig case. In fact, one has the feeling that the majority could hardly refrain from formally attacking it.

Considerable light is thrown on this situation by the concurring opinion of Justice Baldwin. Mr. Justice Baldwin was a Jackson appointee, but had joined with the majority in the decision of Craig v. Missouri. He was now with the majority in Briscoe v. Commonwealth Bank. He evidently felt that his position was so inconsistent as to require a public explanation; and he proceeded to give a rather poor one. More interesting, however, than the quality of his explanation, is the very fact that he considered one necessary. This in itself would indicate that the two decisions were inconsistent. And this is accentuated by the fact that he assumes that Justice McLean, who dissented in Craig v. Missouri,

is consistent in now joining the majority.

It is also interesting to note in this connection that Justice McLean, who dissented then, did not now openly attack the decision in Craig v. Missouri; and that the entire court formally assumed it to be good law. This exemplifies another one of the inci-

dental beauties of our system of constitutional law coupled with the doctrine of stare decisis. It practically makes frankness on the part of judges impossible, and almost requires them to use mental tricks and evasions and a resort to logomachy.

The most important of the three cases—the one which aroused the greatest interest at the time, was attended by the most heated controversy, and has had a lasting effect upon our jurisprudenceis that of The Charles River Bridge v. The Warren Bridge. This case involved the construction of the famous "impairment of obligation of contracts" clause of the Constitution, the clause which was involved in all of the remedial legislation of the various states which came under the scrutiny of the Court from Sturges v. Crowninshield to Ogden v. Saunders, as well as in the Dartmouth College Case, which it directly called into question.

The facts in the Bridge Case were as follows:

In 1640 the Massachusetts Bay Colony granted to Harvard College the rights of a certain ferry which had been established between Boston and Charlestown. In 1786 it was decided to build a bridge over the Charles River at the place where the ferry was then running; and the Massachusetts Legislature granted to a corporation chartered for the purpose the right to build the bridge and to collect tolls for a period of forty years from its completion, after which time the bridge was to revert to the State. The bridge company, in turn, was to pay to Harvard College annually £200, as compensation for the loss of revenue caused by the building of the bridge and the discontinuance of the ferry.

The bridge was opened in 1787. In 1792 another bridge was projected over the Charles River, connecting West Boston and Roxbury. The original bridge company, known as the Charles River Bridge Company, seems to have complained to the Legislature that the building of a bridge between West Boston and Roxbury would diminish the revenue from its bridge. The Legislature thereupon extended the Charles River Bridge Company's right to

collect tolls for an additional thirty years.

By the time the original forty years was about to expire, there was considerable agitation over the fact that the Bridge Company was to continue to collect tolls, as it had by that time already collected something like thirty times the cost of the original bridge. The continuance of the franchise for another thirty years, with the rapid growth of the city of Boston, was considered

an intolerable burden on the community and an unjust enrichment of the company. The company's shares, originally worth \$100, were now selling at about \$2,000. Thereupon the Legislature chartered a new company to build another bridge between Charlestown and Boston in the vicinity of the old one. The new company agreed to charge the same tolls as those charged by the old company until it took out its investment plus five percent, the bridge then to revert free to the State. It also agreed that in any event the bridge should revert to the State at the end of six years. In other words, the new bridge was really built for the benefit of the community, although it was not built directly by the State.

The new bridge was completed just about the time that the original forty years' franchise to the old bridge company had expired, and that company was operating under the extended franchise. The old company thereupon brought suit to enjoin the new bridge company, known as the Warren Bridge Company, from building or operating the new bridge or collecting any tolls thereon, claiming that the grant of the franchise to the new company and the building of the new bridge were an invasion of its vested rights. The charter of the old bridge company did not grant an exclusive franchise, but it was claimed that it did so by implication; and that the granting of the new charter was therefore an impairment by the State of Massachusetts of the obligation of its contract with the old bridge company. The old bridge company's case was based on the following three points:

1. That a legislative grant was a contract, that point having

been decided in Fletcher v. Peck.

2. That a corporate charter was a contract, a point decided in

the Dartmouth College Case.

3. That a grant of a ferry or bridge franchise, even though not exclusive by its terms, is nevertheless implicitly exclusive—that the law would read into the charter an agreement on the part of the State not to grant any other franchise which would diminish the revenue derived from the old franchise.

This latter point had never been directly adjudicated by the United States Supreme Court. But it was claimed on behalf of the old bridge company that the reasoning of Fletcher v. Peck and

of the Dartmouth College Case covered the point.

The Massachusetts courts decided against the old bridge company. The judges of the highest court of that State were, however,

divided in their opinion, and the case was decided by a majority vote. The case was thereupon taken up to the United States Supreme Court, where it hung fire for six years. It was first argued in 1831 before Judges Marshall, Story, Thompson, McLean, and Baldwin; Judges Johnson and Duval being absent. It is understood that at that time Marshall, Story and Thompson were in favor of the old bridge company, while Baldwin was opposed. McLean's position is not definitely known. It is also understood that Judge Story was then commissioned by the majority of the court to write the opinion in a decision in favor of the old company, but that the court later changed its mind, because of the fact that the three judges who united in the decision, while a majority of the court who heard the argument, were only a minority of the entire court.

While the case was pending in the Supreme Court, that Court underwent some changes in its personnel. When the case came finally to be heard in 1837, Taney was Chief Justice, and only Story and Thompson remained of the "old" court; while of the judges who had originally heard the case, only four—Story, Thompson, McLean, and Baldwin—still remained on the Bench.

The decision as finally rendered was a five to two decision; and it is interesting that the five judges who comprised the majority were all Jackson appointees, while the two judges who remained from the pre-Jackson period dissented. It should be noted, however, that Judge McLean, although joining the majority to sustain the decision of the Massachusetts state courts, placed his decision on a technical point which had nothing to do with the basic constitutional question. On this point McLean sided with the minority, consisting of Judges Story and Thompson. It is of considerable interest in this connection that Judge McLean was Jackson's first appointee to the United States Supreme Court, and that although he was with the Jackson administration he was not really of it. Indeed it was claimed at the time, and is now generally accepted by historians, that McLean's appointment to the United States Supreme Court was due to the fact that Jackson wanted to get rid of him as Postmaster-General, and could find no better way of doing so—owing to the political situation at the beginning of Jackson's first administration—than by elevating him to the Supreme Bench.

From a constitutional point of view, the Charles River Bridge

Case is one of the most important ever decided, both because of its direct bearing upon one of the gravest problems then before the people—namely, the question of the development of the country by means of railroads and other public improvements—and because of the fundamental principles of constitutional construction involved therein. In one of its aspects it involved the same problem as the Dartmouth College Case: How far a public franchise granted to a private corporation by the Legislature constitutes a contract on the part of the State, so as to bring it within the "impairment" clause of the United States Constitution. In another aspect it involved the fundamental problem on which the Supreme Court so hopelessly divided in Ogden v. Saunders—namely, what constitutes an "impairment" of a contract?

Judges Taney, Story, Baldwin, and McLean wrote separate opinions. Chief Justice Taney wrote the leading opinion. It is the briefest of the four, and in its manner is strongly reminiscent of Marshall's best opinions. The problem is approached from a broad, statesmanlike, point of view, and Taney is careful not to lose himself in the discussion of technical legalistic points as distinguished from constitutional problems. It is a political opinion, in the same way that Marshall's great opinions from McCulloch v. Maryland to Gibbons v. Ogden are political opinions—that is, as expressions of a theory of government. In contrast to this comparatively brief opinion (it contains about eighteen thousand words), is Judge Story's opinion consisting of about thirty thousand words. The opinions of the other judges (except Judge Baldwin's, which must be considered separately) occupied, as far as size is concerned, a middle position. The same is true of the manner in which they treated the subject. In this, also, these judges (again exception must be made of Baldwin) took a middle position between Taney's statesmanship and Story's legalistic technicalities.

Judge Baldwin was moved by the decisions in these three cases, though probably mostly by the Charles River Bridge Case, to write a substantial volume of over 100,000 words, containing a general view of the United States Constitution, and separate opinions applicable to each of the three cases here under consideration. That portion of his book which referred to the Charles River Bridge Case specifically is about 20,000 words long. This is an exhaustive reply to Mr. Justice Story's argument, in so far as it is

based on technical law. In it Judge Baldwin not only follows Judge Story through the various ramifications of this branch of his argument; but he may be said to outdo Judge Story in the use of the latter's particular apparatus—learnedness in the Common Law.

Judge Story's dissenting opinion in this case has been highly praised, and Mr. Warren in his Supreme Court quotes no less an authority than Charles Sumner in its praise,-contrasting it favorably with that of Chief Justice Taney. We venture to say that the critical judgment of posterity does not agree with the great Massachusetts statesman; and that the further this posterity is removed from the decision the less is it likely to agree with Sumner's judgment. Learned, Mr. Justice Story's opinion certainly is. It is probably one of the most learned judicial opinions ever written in this country. But we believe it to be also one of the poorest ever written by a jurist of such eminence. To our mind Judge Baldwin, using the same apparatus of Common Law lore, completely demolished every point made by Judge Story. But this is not the most important objection to Judge Story's opinion, although it is a very interesting circumstance in view of Judge Story's great reputation as a Common Law lawyer. A far more important consideration, and the only one admissible in connection with the evaluation of that opinion as a piece of constitution-making, is the utter futility of the learned apparatus which Story so laboriously employed, and the appalling consequences which would flow from the employment of that apparatus if it were to become the recognized instrument of constitutional interpretation.

In reading Mr. Justice Story's learned discourse on the English Common Law with reference to ancient ferries and similar matters, one is overcome by a sense of tragedy. We do not mean only Mr. Justice Story's personal tragedy in fighting for a lost cause—the cause of the "Old Court" so ably presided over by Chief Justice Marshall, whose banner Mr. Justice Story now tried to hold aloft and save from destruction by the onrushing tide of Jacksonian Democracy. What we have in mind is the far greater tragedy of seeing perhaps the most learned lawyer who ever sat on the United States Supreme Court stubbornly looking backward in search of the ideas which were to guide him in the interpretation of the United States Constitution—a Constitution

that was meant, as Marshall himself repeatedly and so ably said, for the government of many future generations yet to come.

The naïveté with which Mr. Justice Story appeals to the authority of the remnants of the feudal law still lingering in the English Common Law as the proper constitutional rule for the government of the United States is indeed tragic. Again and again he pathetically reverts to the fact that he is placing himself squarely on a rule of law three centuries old—little realizing that the older the rule of law the less serviceable is it likely to be in our times. For it must be remembered that the rules of law contended for by Mr. Justice Story, are not rules of guaranty or security based on Magna Charta or some similar constitutional document, fancied or authentic, extorted by the English people from unwilling rulers in the course of their struggle for freedom, but the privileges of these rules that had survived this struggle and remained part of the common law as Judge Story understood it.

"I stand upon the old law; upon law established more than three centuries ago. . . . I will not consent to shake their titledeeds by any speculative niceties or novelties. . . ."

Such is the constantly-recurring refrain of his song.

"I am aware—says he—that Mr. Justice Blackstone, in his Commentaries (2 Black. Com., 347), has laid down some rules apparently varying from what has been stated. . . . If such be his meaning, he is certainly under a mistake. . . . Lord Coke, after stating the decision of Sir John Moulin's case (6 Co. R., 6), adds these words: 'Note the gravity of the ancient sages of the law to construe the king's grants beneficially for his honor, and not to make any strict or literal construction in subversion of such grants.' This is an admonition, in my humble judgment, very fit to be remembered and acted upon by all judges who are called upon to interpose between the government and the citizen in case of public grants. . . .

"My Lord Coke, in his Pleas of the Crown (3 Inst., 181), has

given this very definition of a monopoly" etc., etc.

It was only natural, in view of his entire attitude towards his problem, that in trying to extend the rule of the English Common Law with respect to the subject of grants and rights of ancient ferries so as to cover our modern conditions, Mr. Justice Story should prefer the ancient authorities to the modern ones, although

the recognized rule is that the latest adjudication, providing it comes from an authoritative source, is the true interpretation of the Common Law. Mr. Justice Story was, in fact, appealing not only to the English Common Law as against any possible American Law, but to the ancient interpretation of the English Common Law as against the modern interpretation of that same law—to the old against the new.

If Mr. Justice Story's attitude had prevailed, the result would have been that the remnants of feudalism which were being gradually eradicated from the English Common Law in the course of the last few centuries, would have been reincarnated in the American law under the protection of the United States Constitution. Progress would then have been blocked not only by way of legislation, but also by way of judicial adjudication—a line of progress which had been going on in England practically on parallel lines with that of the legislation.

In thus appealing to rules of law which had prevailed centuries ago, Mr. Justice Story not only overlooked the difference of situation between the United States and England, but also ignored the progress which England itself, with the aid of a couple of revolutions, had made from feudalism to freedom in the course of the last few centuries. It is not the Common Law of England as it existed at the time of the American Revolution, of which Blackstone was the chief exponent, to which Judge Story appealed, but to the Common Law as it had been expounded under the absolutism of the Tudors and the Stuarts.

In view of this cardinal objection to Mr. Justice Story's entire attitude, it seems almost a waste of time to inquire whether he or Mr. Justice Baldwin was right as to the real Common Law rule on the subject. We shall therefore not go into an examination of that subject. It is interesting to note, however, the opposite conclusions to which these two judges, both very learned in the Common Law, came after a thorough investigation of the law of ancient ferries. And if one unlearned in this recondite subject may venture an opinion, we should like to suggest that the reason that these two learned judges came to opposite conclusions was that they set out looking for different things—Mr. Justice Story set out on a hunt for precedents favoring the rights of individuals as against the public, while Mr. Justice Baldwin was looking for precedents favoring the rights of the public as against individuals.

As is usual in such cases, each found exactly what he wanted. The truth is that there is no such thing as The English Common Law. The English Common Law, much like our own constitutional law, is in a continuous state of flux. It is not something given and unchangeable, but has been and is continually changing as a result of the struggle of various social forces, and at any given time reflects the result of that struggle so far as it had managed to crystallize into judicial decisions. Under such circumstances, the result of any inquiry into what is the Common Law on any given subject is likely to depend on what one is looking for, where he looks for it, and on his own view as to the meaning of the growth and development of that law.

The following is an illustration of the difference of approach to the problem by the two learned justices here under discussion:

Mr. Justice Story's research into the authorities led him to the conclusion that if the grant of the ferry rights to Harvard College in 1640, or of the bridge rights of the Charles River company in 1786, had been made by the King of England instead of the Commonwealth of Massachusetts, the old Bridge company could have prevented the construction of the new bridge. Whereupon he exclaims:

"The justice of the Commonwealth will not (I trust) be deemed less extensive than that of the crown."

Mr. Justice Baldwin's researches into the same recondite field led him to the opposite conclusion—whereupon he exclaims:

"It is difficult to assign a good reason why public rights should not receive the same protection in a republic as in a monarchy, or why a grant by a colony or State should be so construed as to impair the right of the people to their common property, to a greater extent in Massachusetts than a grant by the king would in England."

It is also interesting to observe how the different points of departure of the judges colored not only the results of their researches into the past of English law, but also their prophecies as to the future course of American history as it might be affected by the decision of the case under consideration. Mr. Justice Story claimed, indeed, that the effects of his decision upon the future course of the history of this country was a matter of indifference to him. We need not stop here to consider whether or not that is

a proper point of view from which to interpret a constitution; except, perhaps, to remark in passing that that was not Marshall's point of view. But notwithstanding this pretended Olympian indifference to consequences, Mr. Justice Story, in the very next breath, takes great care to state that the consequences of the decision of the majority of the Court would cause infinite harm to the country. Says he:

"It has been argued, and the argument has been pressed in every form which ingenuity could suggest, that if grants of this nature are to be construed liberally, as conferring any exclusive rights on the grantees, it will interpose an effectual barrier against all general improvements of the country. For myself, I profess not to feel the cogency of this argument; either in its general application to the grant of franchises, or in its special application to the present grant. This is a subject upon which different minds may well arrive at different conclusions, both as to policy and principle. Men may, and will, complexionally differ upon topics of this sort, according to their natural and acquired habits of speculation and opinion. For my own part, I can conceive of no surer plan to arrest all public improvements, founded on private capital and enterprise, than to make the outlay of that capital uncertain and questionable, both as to security and as to productiveness. No man will hazard his capital in any enterprise in which, if there be a loss, it must be borne exclusively by himself; and if there be success, he has not the slightest security of enjoying the rewards of that success for a single moment. If the government means to invite its citizens to enlarge the public comforts and conveniences, to establish bridges, or turnpikes, or canals, or railroads, there must be some pledge that the property will be safe; that the enjoyment will be co-extensive with the grant; and that success will not be the signal of a general combination to overthrow its rights and to take away its profits. The very agitation of a question of this sort is sufficient to alarm every stockholder in every public enterprise of this sort throughout the whole country."

Needless to say, the other Justices took exactly the opposite view. In fact, the other Justices did not pretend to be indifferent to these consequences, and frankly gave these supposed consequences a prominent place in their consideration determining the subject. This is particularly true of Chief Justice Taney, whose opinion, as we have already stated, came nearest to the best opinions of Chief Justice Marshall in the manner of handling the subject of constitutional interpretation. In an impassioned perora-

tion strongly reminiscent of $McCulloch\ v.\ Maryland\ and\ Gibbons\ v.\ Ogden$, he exclaims:

"And what would be the fruits of this doctrine of implied contracts on the part of the States, and of property in a line of travel by a corporation, if it should now be sanctioned by this court? To what results would it lead us? If it is to be found in the charter to this bridge, the same process of reasoning must discover it in the various acts which have been passed within the last forty years, for turnpike companies. And what is to be the extent of the privileges of exclusion on the different sides of the road? The counsel who have so ably argued this case, have not attempted to define it by any certain boundaries. How far must the new improvement be distant from the old one? How near may you approach without invading its rights in the privileged line? If this Court should establish the principles now contended for, what is to become of the numerous railroads established on the same line of travel with turnpike companies; and which have rendered the franchises of the turnpike corporations of no value? Let it once be understood that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of traveling, and you will soon find the old turnpike corporations awakening from their sleep, and calling upon this court to put down the improvements which have taken their place. The millions of property which have been invested in railroads and canals, upon lines of travel which had been before occupied by turnpike corporations, will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still until the claims of the old turnpike corporations shall be satisfied, and they shall consent to permit these States to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world. Nor is this all. This court will find itself compelled to fix, by some arbitrary rule, the width of this new kind of property in a line of travel; for if such a right of property exists, we have no lights to guide us in marking out its extent, unless, indeed, we resort to the old feudal grants, and to the exclusive rights of ferries, by prescription, between towns; and are prepared to decide that when a turnpike road from one town to another had been made, no railroad or canal, between these two points, could afterwards be established. This court is not prepared to sanction principles which must lead to such results."

We need not enter here into an inquiry as to which was the cause and which the effect; whether the different manner of

approach of the respective judges led them to expect different consequences from a given decision of the question before them, or the apprehension of different consequences from such a decision led them to approach the subject from different avenues. The interrelation between political and economic opinions is one of the most interesting fields of inquiry of various special sciences, such as psychology, philosophy, and history. For our purpose it is sufficient to know that there is a definite relation between them. And what is even more important for our subject—that there is a definite relation between one's political and economic opinions and one's views of constitutions and of laws. Particularly when they are so vague and indeterminate as the English Common Law and the United States Constitution. There certainly can be no question of the fact that the difference between the majority and the minority of the United States Supreme Court in the Charles River Bridge Case, as well as in the other two cases we have been considering here, was due not to different results of logical analysis of the Constitution or laborious investigations of the English Common Law, but to their different political and economic opinions.

It may be said without fear of contradiction, and also without casting aspersions upon the judges who sat in the Charles River Bridge Case, that it was decided before those investigations were undertaken; and that the investigations were undertaken to sustain the decisions, and not in order to arrive at them. This is now recognized by all students of the subject, and frankly stated by the most candid of them.

At the particular juncture of the history of the United States which we are now considering, the body of economic and political opinion known as Jacksonian Democracy was at the height of its success. And so the constitutional views represented by the Marshall-Story school of constitutional interpretation, in so far as it lay outside of the special sphere covered by the line of decisions $McCulloch\ v.\ Maryland-Gibbons\ v.\ Ogden$, had to go into the discard.

What would have happened had Fate been less kind to Andrew Jackson in the matter of the removal of obnoxious Supreme Court judges is a matter of interesting speculation. As it is, the result was accomplished in a most peaceful and a most dignified manner—namely, by a voluntary retreat on the part of the United

States Supreme Court in the face of the onward march of Jacksonian Democracy, leaving the field of battle in the possession of the enemy. That that was the light in which the contemporaries regarded these decisions is well-known to students of the subject. A writer in one of the leading periodicals of that day wrote with respect to these decisions:

"Within a brief space, we have seen the highest judicial corps of the Union wheel about in almost solid column, and retread some of its most important steps. It is quite obvious that old things are passing away. The authority of former decisions, which had long been set as landmarks in the law, is assailed and overthrown, by a steady, destructive aim from the summit of that stronghold, within which they had been entrenched and established. It is very remarkable, also, that all the principles yielded by these decisions, either have relation to the sovereign powers of the Union, or to the very essence of social obligation." (North American Review, 1838, p. 153. Quoted in Warren, Supreme Court, II, p. 304)

But this view was not confined to the laity. Chancellor Kent wrote to Judge Story:

"I have re-perused the Charles River Bridge Case, and with increased disgust. It abandons, or overthrows, a great principle of constitutional morality, and I think goes to destroy the security and value of legislative franchises. It injures the moral sense of the community, and destroys the sanctity of contracts. If the Legislature can quibble away, or whittle away its contracts with impunity, the people will be sure to follow. . . . I abhor the doctrine that the Legislature is not bound by everything that is necessarily implied in a contract in order to give it effect and value, and by nothing that is not expressed in haec verba; that one rule of interpretation is to be applied to their engagements, and another rule to the contracts of individuals. . . . I have lost my confidence and hopes in the constitutional guardianship and protection of the Supreme Court." (Warren, op. cit., II, p. 303)

And Mr. Justice Story himself said—or rather wailed:

"There will not, I fear, ever in our day, be any case in which a law of a State or of Congress will be declared unconstitutional; for the old constitutional doctrines are fast fading away, and a change has come over the public mind from which I augur little good." (Quoted in Warren, op. cit., II, p. 302)

Such were the opinions of the opponents of Jacksonian Democracy, to which camp the periodical referred to and the two

great judges belonged. Needless to say, the other side had a different story to tell, and different forecasts to make. But no one could, or attempted to, hide the fact that a great change had taken place. The differences of opinion related only to the estimation of the consequences. Although, again be it noted, that owing to our official theory of constitutional construction, the Jacksonian judges could not say frankly that they were making a revolution, not even those of them who did so consciously. But, after the lapse of some time, it could be told. And told it was, by various people, including some judges of that same school.

So, for instance, Associate Justice Campbell of the Supreme Court, who, some fifteen years later, said emphatically that, by the decision in this case, certain principles for which he contended, and which he claimed had been recognized in certain earlier cases, had been "reaffirmed, their sphere enlarged, and their authority placed upon broad and solid foundations of constitutional law

and general policy."

The profession at large was more outspoken on the subject, and it is now pretty generally recognized by legal historians that the Charles River Bridge Case worked havoc with the Dartmouth College Case and with the school of legal-constitutional thought which that case represented. Opinion is still divided on the question as to which of the two schools was right—the Marshall-Story school, with its adhesion to individual rights, or the Jacksonian school led by Taney, with its emphasis on the rights of the public. But there is practically no difference of opinion as to the fact of a change of front, although some historians have tried to minimize the exact amount of the change or the angle of deviation on the part of the "New Court" from the line of direction established by the "Old Court." Nor is there any difference of opinion now as to the reason for the change of front. Even those historians who try to minimize the amount of change, such as Warren, cannot help recognizing the fundamental difference of attitude between the two courts as presented by Marshall and Taney, respectively, in approaching the problems involved in these cases.

In speaking of Chief Justice Marshall's last years on the bench,

Mr. Warren says:

"But while it is impossible to exaggerate Marshall's service to his country in vitalizing the Constitution and making it a stronger bond of Union, it must be admitted that the time had arrived

when a change in the leadership of the Court was possibly desirable. For at least thirty-one out of his thirty-five years as Chief Justice, Marshall had been out of sympathy with the political views predominant among the people, and inspiring the statesmen at the head of the Government. Moreover, he had never been a profound lawyer deeply grounded in the common law; and he had possessed a highly conservative nature and mental attitude. In view of the changes and reforms which were now taking place in the economic and social conditions, and the liberalization of political sentiment and processes which was marking a new era in the country's development, he was clearly out of touch with the temper of the times and less fitted to deal with the new problems of the day than with the great constitutional questions of the past. This phase of the situation must be regarded, in any correct appraisal of the struggle which ensued over the appointment of Marshall's successor." (Warren, Supreme Court, II, pp. 273-274)

In speaking of the decision in the Charles River Bridge Case, Mr. Warren says:

"Except among the irreconcilable opponents of Jackson, the case was very soon recognized as a bulwark to the people in general, as well as to all business men who contemplated investments of capital in new corporate enterprises and who were relieved against claims of monopoly concealed in ambiguous clauses of old charters. Coming, as it did, just at the period when the new systems of transportation by railroads and canals were first developing, the decision was an immense factor in their successful competition." (Warren, op. cit., II, p. 298)

And in speaking of the differences of temperament and mental attitude between Taney and Marshall, as explaining their different attitude towards questions of constitutional interpretation, Mr. Warren says:

"But Taney differed from Marshall in one respect very fundamentally, and this difference was clearly shown in the decisions of the Court. Marshall's interests were largely in the constitutional aspects of the cases before him; Taney's were largely economic and social. Marshall was, as his latest biographer has said, 'the Supreme Conservative'; Taney was a Democrat in the broadest sense, in his beliefs and sympathies. Under Marshall, 'the leading doctrine of constitutional law during the first generation of our National history was the doctrine of vested rights.' Like his contemporary in England, Sir Robert Peel, he believed that 'the whole duty of government is to prevent crime and to preserve contracts.' Under Taney, however, there took place a rapid development of

the doctrine of the police power, 'the right of the State Legislature to take such action as it saw fit, in the furtherance of the security, morality and general welfare of the community, save only as it was prevented from exercising its discretion by very specific re-

strictions in the written Constitution.'

"The object and end of all government,' Taney had said with great emphasis in the Charles River Bridge Case, 'is to promote the happiness and prosperity of the community by which it is established, and it can never be assumed that the Government intended to diminish the power of accomplishing the end for which it was created. . . . We cannot deal thus with the rights reserved to the States, and by legal intendments and mere technical reasoning take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well being and prosperity.' It was this change of emphasis from vested, individual property rights to the personal rights and welfare of the general community which characterized Chief Justice Taney's Court. And this change was but a recognition of the general change in the social and economic conditions and in the political atmosphere of that period, brought about by the adoption of universal manhood suffrage, by the revolution in methods of business and industry and in means of transportation, and by the expansion of the Nation and its activities. The period from 1830 to 1860 was an era of liberal legislation—the emancipation of married women, the abolition of imprisonment for debt, the treatment of bankruptcy as a misfortune and not a crime, prison reform, homestead laws, abolition of property and religious qualifications for the electorate, recognition of labor unions, liberalizing of rules of evidence and criminal penalties. It was but natural that the Courts amid such progressive conditions should acquire a new outlook responsive thereto. As has been well said, at the very moment when the election of Jackson meant the supremacy of the doctrine of strict construction, there arrived an era in the National life 'when the demand went forth for a large governmental programme; for the public construction of canals and railroads, for free schools, for laws regulating the professions, for anti-liquor legislation, for universal suffrage.' Taney came to the Bench with the view that the States must possess the sovereign and complete power to carry out this programme and to enact useful legislation for their respective populations. To Taney, the paramountcy of National power within the sphere of its competence was of equal but no greater importance than complete maintenance of the reserved sovereignty of the States. . . .

"Holding views like these, it is evident that Taney would approach a case from the human rather than the juristic standpoint, and that he would regard, as of the higher importance, the State power, which touched the individual and the community more closely

than the National power." (Warren, Supreme Court, II, pp. 308-12)

Summarizing the manner of interpreting the United States Constitution during the first half century of its existence, we may say that this period naturally divides into three sub-periods:

During the first of these sub-periods, the Supreme Court, after some hesitancy and vacillation due to the uncertainties attending upon a new government and the unsettled condition of political opinion, definitely ranged itself on the side of one political party and consciously made itself the instrument of that party. Partly because of its political views, and partly because of a desire to serve that political party as the best instrument of government, the Court attempted to grasp at the power of controlling the National Legislature, as a means of forcing upon the people of the United States the political doctrines of that party. The political doctrines thus embraced by the Judiciary were extremely conservative, and because of its conservatism the Judiciary attempted to engraft the English Common Law upon our system of jurisprudence, particularly our criminal law. This attempt brought the United States Supreme Court and the rest of the Federal Judiciary into collision with the sentiments of the people, which has developed in a contrary direction, resulting in a tremendous loss of prestige to the Judiciary.

During the second of these sub-periods, the Supreme Court, under the leadership of Chief Justice Marshall and owing to the rise of Nationalism, found itself in sympathy with the aspirations of the people and on the crest of a wave favoring the extension of the powers of the Federal Government so as to secure to it all the powers it might need in order to become a real National Government. Taking advantage of this situation, the Supreme Court, through Chief Justice Marshall as its mouthpiece, made a series of decisions and delivered a series of opinions which marked a distinct epoch in the Constitutional History of this country, and which still constitute the foundation of our Constitutional Law in the domain of Federal relations. Although these decisions found opposition in many quarters because they affected particular state interest, they were on the whole popular with the people of the country, and brought great prestige to the Supreme Court. Alongside of these cases, however, the Supreme Court also decided

two important cases which carried forward its earlier tradition of conservatism—accentuating individual and property rights against the people's rights—which prevented it from gaining the entire confidence of the people and of becoming its undisputed leader.

The principles embodied in these latter decisions soon assumed a position of crucial importance owing to the financial distress caused by the panic of 1819 and the economic development which followed the revival of business. This led to renewed assault upon the courts by the democratic forces of the country, to a struggle for the control of the Supreme Court, and to divisions within that Court itself. After a long and bitter struggle, the conservative principles which dominated the Supreme Court from its inception,—which had been obscured for a time by the popular Nationalistic decisions, but which again came to the fore after that brief glorious period—were decisively repudiated by the people, and the Supreme Court sank into an obscurity and impotence from which it did not emerge until long after the close of this period.

In reviewing this period, two facts of importance should be

noted:

The first is, that after the futile attempt made by the U. S. Supreme Court under the leadership of John Marshall, in 1803, to assert the power of the Federal Judiciary to declare Acts of Congress unconstitutional, no attempt was ever again made to carry that power into execution during the entire thirty-two years that Marshall remained at the head of that Court.

The other important fact is, that the most famous decisions during the entire fifty-year period—the decisions in which Marshall delivered his most brilliant opinions and upon which his fame as a statesman must rest—have no relation whatever to Marbury v. Madison, or to the power, therein asserted, of the Federal Judiciary to declare Acts of Congress unconstitutional. On the contrary, these really great decisions were decisions in which Acts of Congress were upheld and the legislative competence of Congress asserted and maintained.

It should be further noted that when the Judiciary was compelled to retreat owing to the forward march of Jacksonian Democracy, it did not have to retreat from those decisions which had sustained the powers of Congress, but only from those in which the Supreme Court had attempted to force its conservative views of the relation of the public welfare to individual and property

rights. In other words, the abiding results of constitutional interpretation during the first half century of the existence of the United States Constitution were embodied in the decisions sustaining powers claimed by Congress under the United States Constitution; while the zig-zag course and the final retreat of the Judiciary related to decisions in which the courts attempted to curtail and limit the use of legislative power for the public welfare.

This is, perhaps, the place to call attention to a curious passage in De Tocqueville written during the latter part of the period we are discussing, which we believe has hitherto not received the attention which it deserves. In speaking of the Judicial Power as he knew it, the great French writer says:

"Whenever a law which the judge holds to be unconstitutional is argued in a tribunal of the United States he may refuse to admit it as a rule; this power is the only one which is peculiar to the American magistrate, but it gives rise to immense political influence. Few laws can escape the searching analysis of the judicial power for any length of time, for there are few which are not prejudicial to some private interest or other, and none which may not be brought before a court of justice by the choice of parties, or by the necessity of the case. But from the time that a judge has refused to apply any given law in a case, that law loses a portion of its moral cogency. The persons to whose interests it is prejudicial, learn that means exist of evading its authority, and similar suits are multiplied, until it becomes powerless. . . . Moreover, although it is censured, it is not abolished; its moral force may be diminished, but its cogency is by no means suspended, and its final destruction can only be accomplished by the reiterated attacks of judicial functionaries." (De Tocqueville, Democracy in America, Vol. I, Page 100, Edition 1900, Colonial Press)

This statement is, of course, contrary to our notion of the effect of the holding of a law unconstitutional by the courts. This is not the way the Judicial Power works today. An interesting question arises: Has the Judicial Power always worked as it does today? Has it always been true that a decision holding a law unconstitutional disposed of a law once and for all? Or is it, perhaps, true, as De Tocqueville asserts, that the effect of a decision was limited to the particular case; and that the law failed only after successive assaults by "judicial functionaries," as he puts it? In other words, is it, perhaps, true that when judges, during the early decades of the nineteenth century, said that they were not

declaring the law unconstitutional but merely refusing to give it effect in a particular case, they really meant what they said, and that the practice then was actually in conformity with such assertions? This would certainly be in accord with the theory of the Judicial Power prevalent during the early decades of the Nineteenth Century that in declaring a law "unconstitutional" the courts were not imposing a construction of the Constitution upon others, but merely applying their own construction of the Constitution to the matter which was before them for adjudication.

In view of the lamentable state of our judicial historiography, it is impossible to express a definite opinion on this subject at this time, but there is certainly much to be said in favor of De Tocqueville's contention. It is inherently probable, and in accordance with the official theory of the courts themselves. De Tocqueville was an acute observer, and a great student of political theory and institutions. And the fact that, although DeTocqueville's work has been well known in this country almost from the day of its publication a century ago no one has risen to formally contradict his assertion, is in itself strong evidence of its correctness. It would seem that our official upholders of the Judicial Power could more profitably spend their time in investigating this subject than in searching for precedents that never existed.

Before concluding this survey we must call attention to another judicial opinion belonging to the period of the Old Court-New Court controversy in Kentucky—an opinion which probably is unique in the annals of our judicial history. This is the dissenting opinion of Judge Gibson of the Pennsylvania Supreme Court—later Chief Justice of the State—in Eakin v. Raub, (12 Sargent & Rawle, 330), decided in 1825; in which Judge Gibson, in an elaborate and well-reasoned opinion, denies the existence of the power of judicial review and completely demolishes all the arguments usually advanced in its favor. While this opinion does not in terms refer to John Marshall or Marbury v. Madison, it is apparent that it was intended as an answer to Marshall's opinion in that case.

Before discussing the opinion, however-just a few words

¹ Perhaps it should be noted here that the expression "unconstitutional" does not occur in *Marbury v. Madison*; nor in any other of Marshall's opinions with reference to any Federal law. The significance of this is obvious.

about Judge Gibson. It is a sad commentary on the state of historical knowledge among the legal profession that Judge Gibson's name is hardly known to the present generation of lawyers, although he is undoubtedly one of the greatest jurists this country has ever produced. In his own day he ranked high in the profession and loomed large in the public eye, not only because he was for many years the Chief Justice of the leading State of the Union, but because it was generally believed that but for the exigencies of politics he would have been John Marshall's successor as Chief Justice of the United States Supreme Court. But his true fame rests on more solid foundations than mere position —it is founded on his merits as a great scholar and pathfinder in the realm of our jurisprudence. As such he ranks among the few of the very first rank—far outranking John Marshall. It is difficult to compare a judge who is today hardly known to the general profession with the most illustrious name in our judicial history—and the above statement may be considered worse than extravagant. We, therefore, hasten to say that we have good authority for our statement.

In an article written by Professor Morris R. Cohen in the American Law Review for March-April, 1914, he compares Gibson to Mansfield and Shaw as "one of the creative minds of our legal history." (Cohen, The Process of Judicial Legislation, 48 Am. L. R., p. 161)

Two years later, Professor Wigmore, in an article about Judge Holmes, said:

"As I look over the long list of judges of American Supreme Courts, and even over the much shorter one of those who achieved eminence or possessed originality (and these two are not always the same), Justice Holmes seems to me the only one who has framed for himself a system of legal ideas and general truths of life, and composed his opinions in harmony with the system already framed. His opinions present themselves as instances naturally serving to exhibit this general body of principles in application. The framework is his own, and not some orthodox commentator's. Shaw, Bronson, Tilghman, Lumpkin senior, Gaston, Ryan, Field (of Massachusetts), Doe, Gibson, Walworth, Blackford, Nelson, Mitchell, Beasley, Napton, Selden, Daly, Appleton, Goldthwaite,—none of these (not to mention living ones) give the impression of having worked out, themselves, and for their own use, an harmonious construction of general princi-

ples. I suppose that Kent came the nearest to doing it." (Justice Holmes and the Law of Torts, 29 Harvard Law Review, 601)

And only the other day, Prof. E. H. Woodruff, in a review of a book of essays by Judge Cardozo, had occasion to refer to "American judges who are outstanding figures in our judicial history," and he proceeded to name—"Kent of New York, Gibson of Pennsylvania, Shaw of Massachusetts, Doe of New Hampshire, Mitchell of Minnesota, and Bleckley of Georgia."

Dean Wigmore's omission of Marshall, taken in conjunction with his pointed distinction between those judges who achieved eminence and those who possessed originality, perhaps best indicates the difference in the attitude of legal scholars towards the two men which we are here considering.

And now for the opinion in Eakin v. Raub.

Owing to Marshall's eminence and the actual course of our constitutional development, it is only natural that the profession should accept uncritically Marshall's opinion in Marbury v. Madison and pay no attention at all to Gibson's dissenting opinion. But there are, nevertheless, indications here and there of how some of the most acute minds have regarded these opinions—and these do not point to any high estimate of Marshall's effort either in itself or as compared with Gibson's opinion. For ourselves we do not hesitate to say that Marshall's opinion is not even in the same class with Gibson's.2 We regret very much that exigencies of space do not permit us to reprint the Gibson opinion, which is very long. But we earnestly hope that all students of the subject may read these two opinions together in Thayer's Cases on Constitutional Law, and then read Thayer's own very interesting note on the subject. (Thayer, Op. cit., Vol. I, pp. 146-154) One cannot read these two opinions without becoming convinced of the utter "inadequacy"—to use Thayer's rather mild term—of Marshall's argument.

² Judge Gibson is said to have changed his opinion towards the end of his life, and the case of Norris v. Clymer (2 Pa. St. Rep. 281) is usually cited as proof of this fact. We do not believe that that case is at all convincing on the point. In fact, the reporter's note of a supposed interjection by Judge Gibson in the course of an argument by counsel which is supposed to evidence this change, is clearly erroneous—in fact, nonsensical—on its face. However, there is no doubt of the fact that Judge Gibson underwent many changes of opinion after 1837, owing to certain circumstances which cannot be gone into here. Just how far this change of opinion went is, however, somewhat doubtful. This subject will be treated in greater detail in a study by the present writer, now in preparation, under the title The Early History of the Judicial Power in Pennsylvania.

CHAPTER XVI

THE PERIOD OF CONFUSION

HE period between 1837 and 1857 was a period of transition in the country, and because of that, a period of uncertainty and confusion in the United States Supreme The rise of Jacksonian Democracy was the last sociopolitical movement in the United States unaffected by the question of slavery. Its last political act, in so far as the people were concerned, was the election of Van Buren as Jackson's successor in 1836. The translation of this movement into constitutional dogma took place in the following year, when the Supreme Court decided the three great cases considered in the last chapter. After that there was uncertainty and confusion all along the line. The curious presidential campaign of 1840 merely presaged the breaking up of the old parties and the formation of new ones on entirely different issues from those which were involved in any previous party formation. But these new issues were so tremendous in their consequences that people dreaded to face them squarely. People hesitated and temporized. It was the Age of Compromise, both formal and informal. Henry Clay-not the dashing and daring Clay of Young America and the War of 1812, but the sagacious compromiser-was the leading statesman, and the Compromise of 1850 was its outstanding political measure.

Compromises were, of course, not unknown in our previous history. The United States Constitution itself is a series of compromises. And the rise of Jacksonian Democracy was preceded by the Missouri Compromise, one of the greatest in our history. But those were, or at least were intended to be, permanent settlements. The compromises of the period now under consideration, on the other hand, were in their very nature mere evasions of the real issues—postponements of the day of reckoning. Such a period is not calculated to bring forward any great men. In so far as there were any outstanding men in the political life of the country

at this period, they were either of the past or of the future—Clay, Webster and Calhoun still dominate the scene until death removes them one by one. They are replaced, toward the end of this period, by Sumner, Chase, Seward, and Lincoln. But the importance of this later group still lies in the future. For the present they are only of local importance. Sumner alone may be said to have grown to full stature during this period—and he had never become a dominating national figure, notwithstanding his great moral and intellectual attainments. The real heroes of this period were the Abolitionists—and they were outcasts.

Perhaps the best commentary on this period is the fact that even well-informed people have great difficulty remembering the names of our presidents between Van Buren and Buchanan. And the former is likely to be best remembered as Jackson's successor, and the latter as Lincoln's predecessor. From 1840 on, slavery clearly dominated the scene; but it dominated only to create confusion. Everything was done with a view to slavery, but few people were agreed as to what ought to be done, even if they were agreed as to ultimate aims. And very few adhered for long to any given line of action or thought. This confusion was particularly unfortunate because the country was going through a period of rapid economic progress, and many economic problems were awaiting solution—problems that could be solved only by people with a clear perception of the nature of the changes which the country was undergoing, and undimmed vision as to what the country needed in order that the new economic forces might be properly utilized for its good. Such a situation is particularly unfortunate under our system of government, where every judicial error becomes a permanent part of our Constitution, thereby making temporary confusion of thought a source of lasting mischief to confound future generations.

There were two circumstances, however, which tended to counteract the great harm which would undoubtedly have resulted from this unfortunate situation: One was the fact that the majority of the judges, being bred in the Jacksonian school, were not aggressive on the question of Judicial Power. As a result, there were few acts of commission of any kind by the Supreme Court during this period which could serve as binding precedents in the future. The other was the fact that after a while the confusion became so great and so glaring that it could not be concealed,

even under the many protective fictions which surround the Judicial Power in this country. As a result, subsequent generations of judges could disregard the decisions of this period with a minimum of disturbance to our official theory of government.

Of the decisions of this period (1837-1857) seven cases deserve attention here. Two of them will be treated separately in subsequent chapters. Here we shall consider the other five as illustrating the point now under consideration. They are, in the order in which they were decided: Holmes v. Jennison (14 Peters, 540; 1840); Groves v. Slaughter (15 Peters, 449; 1841); Prigg v. Pennsylvania (16 Peters, 539; 1842); The License Cases (5 Howard, 540; 1847); and The Passenger Cases (7 Howard, 283; 1849).

The first of these cases had apparently no connection whatever with the subject of slavery. Its decision was neverthless dominated by that question. And the decision in this case shows the complete break with the past, in that the firm line taken by the Supreme Court in the first years of Taney's Chief Justiceship had given place to divided counsel and confusion of thought which had to be acknowledged by the Court in giving its decision. The case involved the question of the right of a state to extradite a fugitive from justice at the request of a foreign country.

George Holmes was charged with the crime of murder, alleged to have been committed in Canada. He escaped into Vermont, where he was arrested at the request of the Canadian government on a warrant issued by the governor, directing the Sheriff of Washington County to convey and deliver Holmes "to William Brown, the agent of Canada, or to such person or persons as, by the laws of said province, may be authorized to receive the same. at some convenient place, on the confines of this State and the said Province of Lower Canada; to the end that he, the said George Holmes, may be thence conveyed to the said District of Quebec, and be there dealt with as to law and justice appertains." Holmes thereupon sued out a writ of habeas corpus, claiming that the Governor of Vermont had no right to extradite him at the request of a foreign country to answer for a crime alleged to have been committed in that country. This raised the very important question: Where does the right of extradition reside in the absence of any treaty between the United States and a given foreign country covering the subject? The subject is an interesting one from a constitutional point of view, but hardly one to get excited

about in ordinary circumstances. And it is extremely doubtful whether either the Supreme Court or the country would have been particularly wrought up over Mr. George Holmes' fate, if it had not been for the fact that the country was living in the shadow of the great question of slavery.

In view of this tremendous question, however, the problem ceased to be a purely legal question as to the power of a state to extradite a criminal at the request of a foreign country in the absence of an extradition treaty between the United States and that country. For the question of extradition touched on the question of fugitive slaves-and anything that touched even remotely on the question of slavery had a sinister aspect, and led to divided counsel and confusion of thought. As a result the Court was not only divided on the subject, but divided in so many ways that there was no majority for any particular opinion. This had never happened before, although it was to be repeated again and again during this period of confusion. The Court, therefore, by an evenly divided vote (Judge McKinley being absent), refused to assume jurisdiction, on the highly technical ground that under the law giving the Supreme Court appellate jurisdiction it was not clear whether it had the right to revise a decision rendered in a habeas corpus proceeding. But the opinions rendered show that even this action, although it had behind it the vote of a majority of the Court, did not have behind it the opinion of the majority of its members. And this, in turn, was due to the fact that some of the judges were deliberately trying to evade the responsibility of deciding the main question, as to whether or not the Governor of Vermont had the right to extradite an alleged fugitive at the request of a foreign power. Five opinions were delivered: Chief Justice Taney and Associate Justices Thompson, Baldwin, Barbour and Catron each writing an opinion. Chief Justice Taney, who was the only one delivering an opinion in favor of deciding the case on its merits, and in favor of deciding the main question against the State, opened the proceedings by the following announcement:

"The court have held this case under consideration for some time; and as the end of the term is now approaching, it is proper to dispose of it. The members of the court, after the fullest discussions, are so divided that no opinion can be delivered as the opinion of the court. It is, however, deemed advisable, in order

to prevent mistakes or misconstruction, to state the opinions we have respectively formed. And in the opinion which I am now about to express, I am authorized to say that my brothers Story, M'Lean, and Wayne, entirely concur."

The Chief Justice then proceeds to examine the question at great length and with considerable ability, coming to the conclusion, as already stated, that the Governor of a State has no right to extradite an alleged fugitive, holding that the power of extradition is essentially a power appertaining to the Federal Government. And he concludes his opinion with the following statement:

"It is, therefore, our opinion that the judgment of the Supreme Court of Vermont (which dismissed the writ of habeas corpus) ought to be reversed, and the cause remanded to that court; and that it be certified to them, with the record, as the opinion of this court that the said George Holmes is entitled to his discharge under the habeas corpus issued at his instance. In the division, however, which has taken place between the members of the court, a different judgment must be entered."

We need not enter here upon a discussion of the legal question involved, as our interest in the case is mainly historical. And historically two things are of interest: In the first place, the opinions of the Court clearly show that all of the judges who wrote on the subject were influenced by the effect which this decision might have upon the various aspects of slavery. And, secondly, whatever division there was among the judges was not along proslavery and anti-slavery lines, but because both the pros and the antis were divided among themselves as to the possible effect of the decision on the slavery question. And this may be said to be true of all the decisions rendered during this period: The decisions were seldom along lines of pro-slavery and anti-slavery, for the majority of the court was pro-slavery; the confusion being due mainly to the fact that the judges ranged on each side of the main division differed in their views as to the possible or probable effects of a given decision upon the fortunes of the slavery question. To this must be added, that the circumstances were such that it was very hard to decide the probable effect of any given decision on the various ramifications of the slavery problem. The judges therefore vacillated between varying views, and often deliberately adopted a policy of inaction as the best under the circumstances,

in view of the prevailing confusion. This last point clearly appears in Mr. Justice Catron's opinion in the present case, who said very frankly:

"After having had written out for me the very able argument delivered before this court for the plaintiff in error, and after having bestowed much reflection on this subject, and written out my views on every point involved, as the safest mode of testing of their accuracy; I have come to the conclusion, divided as the court is that it is better for the country this question should for the present remain open."

The second of the cases here under consideration, (Groves v. Slaughter) was an action instituted in the Circuit Court of Louisiana, on a promissory note given in the State of Mississippi for the purchase of slaves in that state. The slaves had been imported in 1835-1836, as merchandise for sale, into Mississippi. The Constitution, adopted in October, 1832, declared that the introduction of slaves into that state, as merchandise, or for sale, should be prohibited from and after the first day of May, 1833. But it seems that the legislature had failed to pass any law carrying this constitutional provision into effect until 1837. parties liable on the note contended that the contract was void, having been made in violation of the provisions of the Constitution of Mississippi, the claim being that the provision in question was operative after May 1, 1833, even though there was no legislative enactment to carry it into effect. The holders of the note, on the other hand, claimed that the constitutional provision was ineffective until the legislature had passed some law providing for its being carried into effect. They claimed, further, that the provision of the Mississippi Constitution was in itself unconstitutional as in contravention of the United States Constitution making the regulation of interstate commerce a federal concern. The court was again divided in various ways on the various questions involved, although the reporter managed to get a majority united on what he called the opinion of the court, which was delivered by Mr. Justice Thompson. The chief interest of the case lies in the opinions delivered, which clearly indicate the overshadowing importance of the slavery question, and the adverse manner in which it affected the reasoning faculties of the judges.

Prigg v. Pennsylvania was the most celebrated slavery case prior to the decision of the Dred Scott Case. It involved the

question of the enforcement of the fugitive slave laws, which touched the heart of the slavery problem more nearly than any other question except that question of the power of Congress to abolish slavery in the territories, which was the subject dealt with in the *Dred Scott Case*. And it exhibits more than any other case decided during this period the great passion which the subject of slavery aroused in those days and the confusion which it wrought in judicial minds. Edward Prigg, a citizen of the Free State of Maryland, had been indicted in Pennsylvania for kidnapping, it being alleged in the indictment that on the first day of April, 1837, he made an assault upon Margaret Morgan, a Negro woman, and carried her away with force and violence from the State of Pennsylvania to the State of Maryland, with design and intention there to sell and dispose of her as a slave. The facts in the case were as follows:

Margaret Morgan was claimed to be a fugitive slave, having escaped from the State of Maryland into the State of Pennsylvania. At the time of the occurrences in question, the question of the apprehension and delivery of fugitive slaves in the State of Pennsylvania was regulated by certain laws, among which were: (1) An act passed in March, 1780, entitled "An Act for the Gradual Abolition of Slavery"; (2) an act passed in March, 1788, entitled "An Act to explain and amend 'An Act for the Gradual Abolition of Slavery'"; and (3) an act passed in March, 1826, entitled "An Act to give effect to the provisions of the Constitution of the United States relative to fugitives from labor, for the protection of free people of color, and to prevent kidnapping." The substance of these laws was that whenever an owner or his agent claimed that a person found within the State of Pennsylvania was an escaped slave, he was to apply to a judge or other magistrate for the issuance of a warrant addressed to any sheriff or constable for the apprehension of the alleged fugitive. The sheriff or constable arresting the alleged fugitive was bound to bring him without delay before a judge, who was to decide whether or not the person apprehended was actually a fugitive slave, and if found to be such, the judge was to turn him over to the claimant, together with a certificate showing the person thus turned over into the claimant's custody to be a fugitive slave. This certificate was to be his warrant for the removal of the alleged fugitive from the State of Pennsylvania.

Margaret Morgan had concededly been at one time a slave owned by one Margaret Ashmore, a citizen of Maryland. She fled from her master and came into Pennsylvania in 1832. In 1837, Edward Prigg, the agent of Margaret Ashmore, came into Pennsylvania, obtained from a Justice of the Peace a warrant for the apprehension of Margaret Morgan as an alleged fugitive slave, had her arrested by a constable, together with her children, one of whom had been born in the State of Pennsylvania while she resided there, and had them all brought before the same Justice of the Peace who had issued the warrant. It seems, however, that when the alleged fugitive slave was brought before the Justice of the Peace, the latter refused to proceed further in the matter; whereupon Edward Prigg forcibly carried her off, with her children, into the State of Maryland. The question involved was, whether the provisions of the law of the State of Pennsylvania were binding upon the owner of the slave and his representatives, so that the slave could be reclaimed only in the ordinary course of due court procedure. Or, whether the slave owner had the right to disregard the provisions of the Pennsylvania laws providing for the right of recovery of this particular species of property, and could carry off his slaves whenever and wherever found without regard to the state laws on that subject.

The Court held that the state laws were not binding upon the slave owner, and that a slave owner could, therefore, carry off his slave whenever and wherever found, and in any mode he saw fit. The opinion of the Court was written by Mr. Justice Story, and the anti-slavery people never forgave him for his alleged backsliding. Before the decision of Dred Scott the decision in the Prigg Case was the cause of great excitement among the opponents of slavery, and Mr. Justice Story's action in the case was the occasion of much adverse comment, in which his moral character did not entirely escape attack. This latter question is of no particular interest now, and there can hardly be any doubt that the noted jurist acted according to his lights. But a reading of his opinion reveals two facts which are interesting in our connection, one shedding light upon Mr. Justice Story's character as a jurist, and the other upon the character of the epoch in which this particular opinion was written. And there can be no doubt that the two combined to produce the decision. There can be no doubt of the fact that Mr. Justice Story, opposed though he personally was to slavery, thought that, under the given conditions of the country, statesmanship required that the question of the recovery of fugitive slaves should not be dependent upon the laws of the free states. And there can also be no doubt of the fact that Mr. Justice Story's notion of the sacredness of property, and his medieval and antiquated notions of the rights of owners in the matter of the recovery of property, contributed largely to overcome his aversion to slavery when he came to pass upon the legal question of the rights of an owner to recapture his fugitive slaves.

All of the judges, with the exception of Judge McLean, agreed with Mr. Justice Story in the conclusions at which he had arrived, but most of them dissented most emphatically from some of the constitutional doctrines announced by him; and a perusal of their so-called concurring opinions shows how hopeless was the disagreement among them, how utterly irreconcilable their opinions, and how each man in his own way was affected by the problem of slavery. It would serve no useful purpose to go into a detailed examination of these opinions here, but some of the passages are of more than passing interest. One of them, in particular, deserves attention here because it seems to epitomize the entire history of the Judicial Power. In the course of a rather lengthy opinion, Mr. Justice Wayne said:

"I had intended to give an account of the beginning and progress of the legislation of the States upon this subject; but my remarks are already so much extended that I must decline doing so. It would have shown, perhaps, as much as any other instance, how a mistaken, doubtful, and hesitating exercise of power in the commencement, becomes, by use, a conviction of its correctness."

The next two cases which we are to consider form in many respects a perfect contrast to the three which we have just discussed. The three cases discussed above have only an academic or historical interest—the subjects with which they dealt having become obsolete, principally because of the disappearance of slavery. On the other hand, the matters dealt with in the two cases which we are about to consider have, with the passage of time, become more and more important. So much so, that they now form two of the main divisions of the litigation before the United States Supreme Court; these two cases thus indicating a change in the character of the litigation before the courts, federal as well as state. The only point of resemblance between the two sets of

cases is the fact that all were equally dominated by the overshadowing influence of the slavery question, and all alike show the ear-marks of the era of confusion. If anything, the element of confusion is even more strongly marked in the last two cases than in the first three—due, very likely, to the fact that these two cases were later in point of time than the other three. The confusion of thought seems to have been progressive as time passed on, and the

slavery question became more and more predominant.

The first was really a group of three cases known as The License Cases. They involved the validity of statutes passed by Massachusetts, Rhode Island, and New Hampshire, respectively, looking towards the control of the liquor traffic. And although the passage of the Eighteenth Amendment has rendered the constitutionality of state liquor laws largely academic, the constitutional problems raised by these cases have not by any means become obsolete with the passage of that amendment, as the same constitutional points arise in many other ways, and in connection with many other forms of social legislation, which is becoming more and more frequent as time passes on. The decision in the License Cases would therefore have a tremendous actuality for us today, but for the fact that the battle fought in the judicial forum when the cases were heard, considered and determined, was inconclusive. For that reason, the opinions written in these cases are sometimes cited, but the decision is valueless as a precedent.

And the same is true of the second of the cases here under consideration, which was a group of two cases collectively known as The Passenger Cases. These cases involved two state statutes, one passed by Massachusetts and the other by New York, taxing passengers coming into the ports of New York and Boston-for the maintenance of a marine hospital, in the one case, and for the support of foreign paupers, in the other. In itself, the subject matter involved in these cases is of rather limited application and importance, but the principles involved cover the entire subject of the relation of the States to the Nation with respect to the regulation of foreign and interstate commerce. This case would, therefore, have been of tremendous consequence in the subsequent development of the law under the commerce clause of the United States Constitution, and particularly on the subject of state rate regulation, but for the reasons stated as to the character of the adjudication.

In the first group of cases, the state statutes in question were upheld as constitutional by the unanimous agreement of the judges. But, notwithstanding this agreement as to the decision, the disagreement among the judges as to reasons or grounds for the decision was such that the Court was unable to render an opinion as a court. With the result that six judges wrote nine opinions which are very confusing, to say the least. In the second group of cases the two state statutes were declared unconstitutional by a vote of five to four. But the disagreement among the judges again was such that neither the majority nor the minority could agree on an opinion—with the result that, again, no opinion of the Court as such could be given, each of the nine judges giving his own opinion separately, sometimes stating with which of the other judges he agrees or disagrees, and sometimes leaving it to the reader to judge for himself. The report of each of these two groups of cases constitutes a substantial volume, being about one hundred and thirty or forty thousand words long. And the only impression left after reading this confusing mass of words is that of a nightmare, caused by the inability of the judges to digest the subject of slavery, and of the awful havoc which a fear of the results of their decision upon the slavery question had wrought with their reasoning processes, their respect for precedents, and to a large extent even with their judicial dignity.

The decision in the License Cases is introduced by the official

reporter with the following statement:

"These cases were all brought up from the respective State courts by writs of error issued under the twenty-fifth section of the Judiciary Act, and were commonly known by the name of the

License Cases.

"Involving the same question, they were argued together, but by different counsel. When the decision of the court was pronounced, it was not accompanied by any opinion of the court, as such. But six of the justices gave separate opinions, each for himself. Four of them treated the cases collectively in one opinion, whilst the remaining two expressed opinions in the cases separately."

Each of the cases involved a conviction in the state courts for a violation of a statute designed to control the liquor traffic—selling liquor without a license where the statute provided for the licensing of the liquor traffic. The case coming from the state

courts of Massachusetts (Thurlow v. the Commonwealth of Massachusetts) involved an act passed in 1837 which provided, among other things, that:

"No person shall presume to be a retailer or seller of wine, brandy, rum, or other spiritous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is first licensed as a retailer of wine and spirits, as is provided in this chapter, on pain of forfeiting twenty dollars for each offense."

One of the questions raised by Thurlow at his trial was that some of the sales charged in the indictment were of foreign liquors, and the court charged the jury that the license law under consideration applied as well to imported spirits as to domestic, and that the Commonwealth of Massachusetts could constitutionally control the sale of foreign spirits by retail. It was this point that raised the constitutional question considered in the United States Supreme Court: Could the State of Massachusetts pass a license law governing the sale of liquor at retail which included wines or liquors imported from abroad as well as those of domestic manufacture or origin, in view of the fact that the United States Constitution assigns the regulation of foreign commerce to the Federal Government?

The case coming from the State of Rhode Island (Fletcher v. The State of Rhode Island and Providence Plantations) involved the same question—that is, the power of the State to pass a licensing statute to control the liquor traffic which included the sale of

The case coming from the State of New Hampshire (Peirce et al. v. The State of New Hampshire) involved a similar question with respect to interstate commerce, as it was proven at the trial that the offense charged against the defendants in the state courts was the violation of a licensing law passed by the State of New Hampshire in July, 1838, by selling within the State of New Hampshire a barrel of American gin imported by them from the City of Boston, in the State of Massachusetts, in interstate trade.

There being no official opinion of the Court, the reporter arranged the opinions of the various judges writing, in the order of their seniority. The series is therefore led off by Chief Justice Taney's opinion. The Chief Justice commences his opinion with the following statement:

"In the cases of Thurlow v. The State of Massachusetts, of Fletcher v. The State of Rhode Island, and of Peirce et al. v. The State of New Hampshire, the judgments of the respective State courts are severally affirmed.

"The justices of this court do not, however, altogether agree in the principles upon which these cases are decided, and I therefore proceed to state the grounds upon which I concur in affirming

the judgments. . . .

"Each of the cases has arisen upon State laws, passed for the purpose of discouraging the use of ardent spirits within their respective territories, by prohibiting their sale in small quantities, and without licenses previously obtained from the State authorities. And the validity of each of them has been drawn in question, upon the ground that it is repugnant to that clause of the Constitution of the United States which confers upon Congress the power to regulate commerce with foreign nations and among the several States."

The Chief Justice then refers to the decision in the famous case of Brown v. Maryland (12 Wheaton, 419), which was then the only case in point, and which had a peculiar personal significance in this connection. Brown v. Maryland, it will be remembered, was the original "original package" case. In that case, decided in 1827, the Supreme Court of the United States declared unconstitutional a Maryland statute which provided that "all importers of foreign articles or commodities, of dry goods, wares or merchandise, by bale or package, or wine, rum, brandy, whiskey and other distilled spiritous liquors, etc., and other persons selling the same by wholesale, bale or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license," for which license they were obliged to pay fifty dollars, and provided certain penalties for a violation thercof. The opinion in that case was written by Chief Justice Marshall. The defeated counsel in the case was Roger Brooke Taney, now Chief Justice, who was then Attorney-General of the Free State of Maryland, and argued the case on behalf of that State, contending for the validity of the enactment. If the statute of the State of Maryland under consideration in Brown v. Maryland was constitutional, then clearly the statutes under consideration in the License Cases were also constitutional. And one, at least, of the judges took that position. But that was not the position taken in the License Cases by Chief Justice Taney. He not only accepted the decision in Brown v. Maryland as binding upon him, but made an interesting confession

to the effect that he had been converted to Chief Justice Marshall's view. This confession is interesting not only because of this personal element, but also because it has a much wider bearing on our subject, in that it shows what are the motives which make judges of the highest character, learning and statesmanship, take position one way or another on constitutional questions. Says he:

"I argued the case in behalf of the State, and endeavored to maintain that the law of Maryland, which required the importer as well as other dealers to take out a license before he could sell, and for which he was to pay a certain sum to the State, was valid and constitutional; and certainly I at that time persuaded myself that I was right, and thought the decision of the court restricted the powers of the State more than a sound construction of the Constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them."

After thus confessing his conversion to the Marshall interpretation of the commerce clause, and giving his reasons therefor, Chief Justice Taney proceeds to show that the statutes under consideration in the *License Cases* do not come within the reasoning which prompted the decision in *Brown v. Maryland* declaring the Maryland statute unconstitutional. His reasons for distinguishing the statutes involved in the *License Cases* from that involved in *Brown v. Maryland* are interesting to the special students of the

¹ It will be observed that Chief Justice Taney does not say that he has been converted to the Marshall view by a re-examination of the text of the Constitution. He frankly admits that his guiding consideration is not a text, but the fact that he has come to the conclusion that the rule adopted by Marshall in Brown v. Maryland is a safe one. In other words, he practically concedes that he regards Marshall's and his own function as being that of constitution-making, instead of merely expounding written texts. Now, when contemplating the Constitution as an instrument of government, as constitutions are regarded by legislatures, such a procedure is quite proper. The Constitution, when so viewed, is merely a general guide to act on—a statement of general principles for the guidance of the Legislature in its work of providing, from time to time, rules of conduct according to which the business of government may be conducted. It is different, however, when the Constitution is regarded as a legal document—which is the theory upon which our Judicial Power is based. A "legal" document must be examined strictly for its contents or meaning in accordance with the intentions of its authors; and its meaning must govern whether it provides just or unjust, safe or unsafe, rules. Such is the official theory upon which the Judicial Power is based. But when it comes to the actual application of this power, this theory is thrown to the winds, and the judges proceed to devise and promulgate what they regard as just and safe rules for the government of the country.

meaning of the commerce clause of the United States Constitution, but need not detain us any further. There is one passage, however, which should be reproduced here for its bearing upon the entire question of constitutionality of state legislation, and that is a passage which gives a definition of the police power. This definition is in our opinion the only correct one, and we venture to suggest that had this definition been accepted and consistently followed by our courts much of our subsequent judicial history would have been entirely different from what it actually came to be. Says Chief Justice Taney:

"It has been said, indeed, that quarantine and health laws are passed by the States, not by virtue of a power to regulate commerce, but by virtue of their police powers, and in order to guard the lives and health of their citizens. This, however, cannot be said of the pilot laws, which are yet admitted to be equally valid. But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the Constitution of the United States. And when the validity of a State law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the Legislature, nor can the court inquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade."

The opinions of the other judges, showing the various points of agreement or disagreement with the opinion of Chief Justice Taney, and their various and varying reasons for coming to the conclusion that the state laws under consideration are constitutional, are not of particular interest here, except the opinion of Mr. Justice Daniel, who let fall some remarks which are still of general interest. He commences his opinion by saying:

"In the decision of the court, so far as it establishes the validity of the license laws of the States of Massachusetts, Rhode Island, and New Hampshire, I entirely concur; and had the opinions of judges in forming that decision been limited strictly to an inquiry into the compatibility of those laws with the Constitution of the United States, or with a just exercise of State power (the only inquiry, in my apprehension, regularly before the court), I should have been spared the painful duty of disagreement with my brethren. To this inquiry, however, those opinions, according to my apprehension, are by no means restricted. The majority of the judges, in fulfillment of their own convictions, have seemed to me to go beside the questions regularly before them, and in this departure have propounded principles and propositions, against which, whensoever they may be urged as motives for action on my part, I shall feel myself bound most earnestly to protest. It has been said, that the principles here objected to have been already solemnly and fully adjudged and established, and should therefore be no longer assailed. The assertion as to the extent in which these principles have been ruled, or the solemnity with which they have been fixed and settled, may in the first place be justly questioned. It is believed that they have been directly adjudged in a single case only, and then under the qualification of an able dissent.

"But should this assertion be conceded in its greatest latitude, my reply to it must be firmly and unhesitatingly this: that in matters involving the meaning and integrity of the Constitution, I never can consent that the text of that instrument shall be overlaid and smothered by the glosses of essay writers, lecturers, and commentators. Nor will I abide the decisions of judges, believed by me to be invasions of the great lex legum. I, too, have been sworn to observe and maintain the Constitution. I possess no sovereign prerogative by which I can put my conscience into commission. I must interpret exclusively as that conscience shall dictate.

"The doctrines which to me appear to have been gratuitously brought into this case are those which have been promulged in the reasoning of this court in the case of Brown v. The State of Maryland, reported in 12 Wheaton, 419—doctrines (and I speak it with all due respect) which I conceive cannot, by correct induction, be derived from the Constitution, nor even from the grounds assumed for their foundation in the reasoning of the court in that case; but which, on the contrary, appear to be wholly illogical and arbitrary.

"In cases of alleged conflict between a law of the United States and the Constitution, or between the law of a State and the Constitution or a statute of the United States, this court must pronounce upon the validity of either law with reference to the Constitution; but whether the decision of the court in such cases be itself binding or otherwise must depend upon its conformity with,

or its warrant from, the Constitution. It cannot be correctly held, that a decision, merely because it be by the Supreme Court, is to override alike the Constitution and the laws both of the States and of the United States."

The position here taken by Mr. Justice Daniel—the only logical position, we submit, if the fundamental theory of the nullity of unconstitutional legislation be correct—is of the most farreaching consequence, and must be faced squarely by all those who still believe in the Wilson-Marshall theory of the judicial review. We should therefore take careful note of these passages before passing on to the consideration of the next case.

The reporter's headnote to the Passenger Cases reads as fol-

lows:

"Statutes of the States of New York and Massachusetts, imposing taxes upon alien passengers arriving in the ports of those States, declared to be contrary to the Constitution and laws of the United States, and therefore null and void.

"Inasmuch as there was no opinion of the court, as a court, the reporter refers the reader to the opinions of the judges for an explanation of the statutes and the points in which they conflicted

with the Constitution and laws of the United States."

As already stated, this case differed from the License Cases in that, in this case, the judges differed not only in their opinions but also in their conclusions, so that the case was decided by a vote of five to four. The judges composing the majority were McLean, Wayne, Grier, Catron and McKinley; while the minority was composed of Chief Justice Taney, and Justices Nelson, Daniel, and Woodbury. It would serve no useful purpose to attempt here to follow the various ramifications of the argument which split the bench three or four different ways. The most interesting thing about the opinions in this case is the frank avowal by practically all of the judges that they were principally concerned with the way in which the decision in this case would affect the slavery problem. By this time (the case was decided in 1849) there was no use pretending that the Court was worrying about anything else. We therefore have both sets of judges trying to prove, either that their decision will in no way hurt the slave-holding interests, or that the contrary decision will do so. So we have Mr. Justice Wayne, of the majority, saying:

"The fear expressed, that if the States have not the discretion to determine who may come and live in them, the United States may introduce into the Southern States emancipated negroes from the West Indies and elsewhere, has no foundation. It is not an allowable inference from the denial of that position, or the assertion of the reverse of it. . . .

"It will be found, too, should this matter of introducing free negroes into the Southern States ever become the subject of judicial inquiry, that they have a guard against it in the Constitution, making it altogether unnecessary for them to resort to the casus gentis extraordinarius, the casus extremae necessitatis of nations, for their protection and preservation. They may rely upon the Constitution, and the correct interpretation of it, without seeking to be relieved from any of their obligations under it, or having recourse to the jus necessitatis for self-preservation."

Another interesting remark of Mr. Justice Wayne is that containing a thinly-veiled assertion of the doctrine of nullification, if not actually of secession, in addition to an implied rejection of the legal document theory of the Constitution. Says he:

"That is a very narrow view of the Constitution which supposes that any political sovereign right given by it can be exercised, or was meant to be used by the United States in such a way as to dissolve, or even disquiet, the fundamental organization of either of the States."

Mr. Justice Wayne's assurances evidently did not carry weight with the minority, and so we find Chief Justice Taney saying:

"If, however, the treaty or act of Congress above referred to had attempted to compel the State to receive them without any security, the question would not be on any conflicting regulations of commerce, but upon one far more important to the States, that is, the power of deciding who should or should not be permitted to reside among its citizens. Upon that subject I have already stated my opinion. I cannot believe that it was ever intended to vest in Congress, by the general words in relation to the regulation of commerce, this overwhelming power over the States. For if the treaty stipulation before referred to can receive the construction given to it in the argument, and has that commanding power claimed for it over the States, then the emancipated slaves of the West Indies have at this hour the absolute right to reside, hire houses, and traffic and trade throughout the Southern States, in spite of any State law to the contrary; inevitably producing the most serious discontent, and ultimately leading to the most painful consequences."

Notwithstanding the fact that the possible repercussions of the decision were patently more important to all of the judges than the actual text of the Constitution, each of the judges was certain that he was giving the correct interpretation of the Constitution; and not only that, but that there could be no doubt of the fact that his interpretation was the correct one. So Mr. Justice Wayne commences his opinion with the following statement:

"I agree with Mr. Justice McLean, Mr. Justice Catron, Mr. Justice McKinley, and Mr. Justice Grier, that the laws of Massachusetts and New York, so far as they are in question in these cases, are unconstitutional and void. I would not say so, if I had any, the least, doubt of it; for I think it obligatory upon this court, when there is a doubt of the unconstitutionality of a law, that its judgment should be in favor of its validity. I have formed my conclusions in these cases with this admission constantly in mind."

The judges of the minority were, of course, equally positive the other way. Chief Justice Taney said in his dissenting opinion:

"And the first inquiry is, whether, under the Constitution of the United States, the federal government has the power to compel the several States to receive, and suffer to remain in association with its citizens, every person or class of persons whom it may be the policy or pleasure of the United States to admit. In my judgment, this question lies at the foundation of the controversy in this case. I do not mean to say that the general government have, by treaty or act of Congress, required the State of Massachusetts to permit the aliens in question to land. I think there is no treaty or act of Congress which can justly be so construed. But it is not necessary to examine that question until we have first inquired whether Congress can lawfully exercise such a power, and whether the States are bound to submit to it. For if the people of the several States of this Union reserved to themselves the power of expelling from their borders any person, or class of persons, whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of Congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the State, would be an usurpation of power which this court could neither recognize nor enforce.2

² In these remarks—containing as they do a clear intimation that the States have a right not to submit to the exercise by the Federal Government of powers not granted to it by the United States Constitution, even though the United States Supreme Court has held that the Constitution does grant such powers—Chief Justice Taney practically accepts the position of the Virginia Court of Appeals in Martin v. Hunter's Lessee. He also knocks out from under the Judicial Power one of its chief props—the argument that there must be some final arbiter between State

"I had supposed this question not now open to dispute. It was distinctly decided in Holmes v. Jennison (14 Pet., 540), in Groves v. Slaughter (15 Pet., 449), and in Prigg v. The Commonwealth of Pennsylvania (16 Pet., 439).

"If these cases are to stand, the right of the State is undoubted. And it is equally clear, that, if it may remove from among its citizens any person or description of persons whom it regards as injurious to their welfare, it follows that it may meet them at the

threshold and prevent them from entering. . . .

"Neither can this be a concurrent power, and whether it belongs to the general or to the State government, the sovereignty which possesses the right must in its exercise be altogether independent of the other. If the United States have the power, then any legislation by the State in conflict with a treaty or act of Congress would be void. And if the States possess it, then any act on the subject by the general government, in conflict with the State law, would also be void, and this court bound to disregard it. It must be paramount and absolute in the sovereignty which possesses it. . . .

"Again, if the State has the right to exclude from its borders any person or persons whom it may regard as dangerous to the safety of its citizens, it must necessarily have the right to decide when and towards whom this power is to be exercised. It is in its nature a discretionary power, to be exercised according to the judgment of the party which possesses it. And it must, therefore, rest with the State to determine whether any particular class or description of persons are likely to produce discontents or insurrection in its territory, or to taint the morals of its citizens, or to bring among them contagious diseases, or the evils and burdens of a numerous pauper population. For if the general government can in any respect, or by any form of legislation, control or restrain a State in the exercise of this power, or decide whether it has been exercised with proper discretion, and towards proper persons, and on proper occasions, then the real and substantial power would be in Congress, and not in the States. In the cases decided in this court, and herein before referred to, the power determining who is or is not dangerous to the interests and well-being of the people of the State has been uniformly admitted to reside in the State. . . .

"The construction of this article of the Constitution was fully

and Nation; which is the only basis of the exercise by the Federal courts of the right of review of state legislation. And there is no gainsaying the logic of Chief Justice Taney's position in this case—as there was no gainsaying the logic of the Virginia Court of Appeals in Martin v. Hunter's Lessee. If it were a mere matter of logic there is no question that the centrifugal forces had the better of the argument. Even in the domain of federal relations—in which the argument for the Judicial Power is strongest—the ultimate power of the United States Supreme Court is inadmissible on the nullity theory.

discussed in the opinions delivered in the License Cases, reported in 5 Howard. . . . After such opinions, judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." 3

The Chief Justice then proceeds to show that he has not only authority but also reason on his side, and is quite as emphatic at the conclusion of his reasoning that reason is on his side as he was after a review of the authorities that they were on his side. And by reason is meant, of course, the reason of the Constitution.

Of the other opinions of the minority Mr. Justice Daniel's opinion is again the most interesting. He commences his opinion with the following statement:

"Of the decision of the court just given, a solemn sense of duty compels me to declare my disapproval. Impressed as I am with the mischiefs with which that decision is believed to be fraught, trampling down, as to me it seems to do, some of the strongest defenses of the safety and independence of the States of this confederacy, it would be worse than a fault in me could I contemplate the invasion in silence. I am unable to suppress my alarm at the approach of power claimed to be uncontrollable and unlimited."

Mr. Justice Daniel then refers to the dangers uppermost in the minds of the judges—namely, the question of slavery—in the following words:

"It would be difficult to limit, or even to imagine, the mischiefs comprised in such an interpretation of the treaty stipulations above mentioned. As one example of these, if it should suit the commercial speculations of British subjects to land within the territory of any of the States cargoes of negroes from Jamaica, Hayti, or Africa, it would be difficult, according to the broad interpretation of the commercial privileges conferred by those stipula-

3 Chief Justice Taney's remarks on stare decisis quoted in the text are extremely interesting, as showing the rôle of the judges as constitution-makers. The naïveté of the great Chief Justice's remark "I am quite willing that it be regarded hereafter" is superb. But this naïveté is not the naïveté of a child which thinks that it can do something that it actually cannot do, but rather the unconscious frankness of one who avows a power that he knows he possesses, but the possession of which it is not quite good form to admit.

tions, to designate any legitimate power in the States to prevent this invasion of their domestic security. According to the doctrines advanced, they could neither repulse nor tax the nuisance."

He then makes some uncomplimentary comments on the use made by the judges of the word "commerce," and particularly the alleged unauthorized substitution therefor of the word "intercourse" on the assumption that both mean the same thing, and concludes his opinion in the following characteristic fashion:

"By permitting such an abuse, every limit may be removed from the power of the federal government, and no engine of usurpation could be more conveniently devised than the introduction of a favorite word which the interpolator would surely have as much right to interpret as to introduce. This would be fulfilling almost to the letter the account in the Tale of a Tub, of Jack, Peter, and Martin engaged in the interpretation of their father's will. Once let the barriers of the Constitution be removed, and the march of abuse will be onward and without bounds."

The most interesting thing about these opinions, however, is not the fact that each side of the controversy is emphatic about the correctness of its special interpretation of the Constitution, which is true of every constitutional case in which there is a division of opinion. Nor that a judge should emphatically assert that there can be no doubt of the correctness of his view, within the constitutional rule requiring that a law can be declared unconstitutional only in a case free from doubt, in face of the dissent of four out of nine members of the Court. We have become too familiar with these things to find them strange any longerstrange as they may seem to logicians or to those living under different systems of government. What makes this case almost unique in the annals of our jurisprudence is the fact that a representative of the majority, upon writing what might be called a concurring opinion, thought it important to specifically enumerate the points intended to be decided by the Court, in language which is curious, to say the least. Said Mr. Justice Wayne:

"I have been more particular in speaking of the opinions of Messrs. Justices McLean and Catron than I would otherwise have been, and of the points of agreement between them, and of the concurrence of Messrs. Justices McKinley and Grier and myself in all in which both opinions agree, because a summary may be made from them of what the court means to decide in the cases before us. In my view, after a very careful perusal of those opinions, and of

those also of Mr. Justice McKinley and Mr. Justice Grier, I think the court means now to decide."

Mr. Justice Wayne then proceeds to enumerate nine points which he thinks the court means to decide. And we must say that the great reserve in Mr. Justice Wayne's language was not out of place, for a reference to the opinions of his brethren of the majority makes it very doubtful whether the court actually meant to decide those nine points. And it may also be added that notwithstanding the trouble to which Mr. Justice Wayne put himself in trying to explain what the Court meant to decide in these cases, it was the general opinion, after these opinions had been published, that nobody knew just what had been decided. Such was the confusion which reigned in the Court at this time.

In discussing these cases in his Supreme Court, Mr. Warren says:

"The diversity, however, of the views of the Judges, as expressed in their various separate opinions, was so great that the Reporter himself, in perplexity, very frankly declared that there was no opinion of the Court as a Court. Equally perplexed were the members of the Bar and the newspapers. A Baltimore paper said: 'Sailors say, in a very hard blow, point no point is the only one you can safely make.' In the present gale of judicial wind, that is about the only point discernible."

It is interesting to note, in closing this rather disheartening chapter of our judicial history, that Mr. Warren, the chief historian of the Supreme Court, cites with approval, in this connection, another contemporary newspaper remark to the following effect:

"These separate opinions are to be deprecated as a great nuisance. It is of more consequence to society that the law should be settled, than that it should be wise. We can alter a bad law—we can even change the Constitution—but uncertain law is tyranny."

And Mr. Warren adds that this was "wisely said." We need not enter here into the question as to whether what was thus said was wise or otherwise. Suffice it to say that it is a matter of discussion among students of jurisprudence, and that it has a respectable body of opinion in its favor, in connection with ordinary laws, whether they be made of legislative origin or judge-made. But it seems to us wholly inadmissible in constitutional decisions.

It is certainly contrary to our official theory of the Judicial Power. And the approval of this remark by the latest and most authoritative historian of the Supreme Court shows how far we have traveled in our conception of the Judicial Power from the original theory of John Marshall and his coadjutors.

Incidentally, the statement is wholly untrue as far as the United States Constitution is concerned, and therein lies the difference between ordinary laws and constitutions. We can alter a bad law, and by legislation change a bad decision,—but we cannot change the Constitution. At least, not the United States Constitution. A bad constitutional decision, therefore, not only changes the Constitution, but changes it irrevocably in most cases. This is the greatest practical objection to the Judicial Power: We may alter a bad law, whether adopted by a State Legislature or by Congress—but we cannot alter a bad constitutional decision.

CHAPTER XVII

RIVERS VERSUS RAILROADS

HE first of the two remaining cases of this period which we are to consider is that known officially as The State of Pennsylvania v. The Wheeling and Belmont Bridge Company, (13 Howard, 518). This case had been many times before the Supreme Court, which was called upon to adjudicate on various phases of a long and protracted litigation involving the construction of the bridge over the Ohio River at Wheeling, West Virginia. The principal decision was rendered in 1852. As the title of the case indicates, the State of Pennsylvania was the plaintiff and the company that constructed or owned the bridge was the defendant. And unlike other cases in which a state appears as plaintiff, in this case the State of Pennsylvania was not a mere nominal but the actual plaintiff, having brought this action in the Supreme Court to procure the removal of the bridge over the Ohio River on the ground that it was a public nuisance in that it obstructed the traffic on the Ohio River. This alone made the case unusual in our judicial annals, and it was rendered even more so by the fact that this action was brought by the State of Pennsylvania not in its character as a state—that is to say, as a government but rather in its character as a private property owner. The basis of the action was an alleged claim by the State of Pennsylvania that because of the obstruction of the traffic on the Ohio River caused by the bridge that spanned the river at Wheeling, its income, as the owner of certain canals in the State of Pennsylvania which were used as feeders to the Ohio River, was diminished.

The case was argued on behalf of the State of Pennsylvania by Edward M. Stanton, one of the leading lawyers of the time and later to become famous as Lincoln's great Secretary of War, and the direct cause, or at least the instrument, of the impeachment of President Johnson. On behalf of the defendant company the case was argued by Senator Reverdy Johnson, one of the most

noted constitutional lawyers of his time. There were also other features of this case which rendered it quite unique in our judicial history. Among these is the fact that it is the only case in our entire judicial history in which Congress overruled the Supreme Court, by passing an act legalizing the bridge which the United States Supreme Court had declared to be illegal as a public nuisance. It was also unique in that it directly involved an economic problem. And while practically all of the important litigation before the United States Supreme Court is caused by or involves economic questions, those questions are usually involved indirectly and only after they have gone through a process of distillation or conversion into political problems; while in this case, the economic issues were presented directly. Of course, formally, the problems involved in this case as treated by the Court were legal, which in this connection means political. But the politico-legal covering was so transparent that it did not furnish the usual disguise. So that the erudite historian of the Supreme Court was led to say, and truly, that: "Fundamentally, the case presented one phase of the great contest between the railroads and the steamboats in their struggle for supremacy and the development of modern means of transportation." (Warren, Supreme Court, II, p. 509)

Incidentally, this case illustrates one of the gravest dangers to progress inherent in the Judicial Power in a way which has not usually been noticed—or, at least, not of late. As we shall see in the further progress of this work, the modern controversy over the Judicial Power centers around the question of social amelioration, or social progress, in the sense of a more just or equitable distribution of the benefits of economic progress among the various groups and elements constituting our society. In this controversy it is assumed on all sides that whatever may be the result of the existence of the Judicial Power and its exercise in its modern form on the equities of social distribution, there can be no danger from it to economic progress as such—that is to say, to the accumulation of wealth as distinguished from its distribution. But upon investigation this assumption will be found to be utterly unwarranted, and due entirely to the peculiar conditions under which the latest phase of this controversy has developed. If we look further back into the history of the Judicial Power, we shall find that it is, or at least may become, a serious menace not only to social progress in the more limited sense, but also to economic progress as

such. In its larger aspects this has been recognized by modern historians, at least in so far as the decision of the famous *Dred* Scott Case is concerned.

That decision will be later discussed at greater length, but we may remark here that those who believe—and there are few historians who do not believe it now—that slavery was an incubus upon the economic progress of this country, must of necessity conclude that the attempt of the Supreme Court in that case to fasten slavery upon this country forever was the greatest danger with which the economic progress of this country was ever faced in its entire history. But that decision apart, it is generally assumed that the decisions of the United States Supreme Court have favored economic progress. The case now under consideration conclusively proves the fallacy of this assumption. There can be no doubt that in the great contest between the rivers and the railroads as avenues of traffic and intercourse, the railroads represented progress. More than that, they represented an absolute necessity if this country was to be developed as it has actually been developed. The decision in the Wheeling Bridge Case attempted to place a barrier in the path of this development. And but for the fact that Congress was more progressive than the Supreme Court—and the additional fact that the ground of the Supreme Court's decision was such as permitted it to be overruled by Congress—our economic development, if not actually arrested, would certainly have been greatly retarded. To what extent it would have been retarded it is, of course, now impossible to determine; but that the damage would have been vast, perhaps incalculable, is quite apparent. It is now generally recognized that even as a purely legal proposition, the United States Supreme Court was wrong; and that august tribunal has since practically abandoned the position which it assumed in that case—although, as is usual in such cases, it has attempted to cover its retreat by various fictions in the form of legal distinctions.1

¹ This is one important decision of the United States Supreme Court—a decision important enough to have affected the entire course of our history, if it had been permitted to stand—on which opinion seems to be uananimous in condemnation. Outside of the Dred Scott Case we do not know of any other case on which the adverse opinion is so unanimous as not to find any defender for it. And the only reason we hear less about it than about the Dred Scott Case is that its reversal came so quickly that it has been relegated to the limbo of forgotten cases. But that does not detract from its importance in a discussion of our constitutional doctrine as the basis of a system of government. In such a discussion it is the possibilities that count—and the possible consequences of this decision, had it been permitted to stand, are quite appalling.

The history of this case, briefly stated, is as follows: For some years prior to 1847 attempts had been made to obtain congressional aid in the erection of a bridge over the Ohio River at Wheeling, then Virginia, now West Virginia. Those attempts proving unsuccessful, the defendant corporation was organized in that year to construct the bridge by private capital, under a charter from the State of Virginia, and it proceeded to construct the bridge. Thereupon the State of Pennsylvania, which was controlled by the rivertraffic interests as opposed to the railroad interests, filed an original suit in the United States Supreme Court for the removal of the bridge, on the ground that it was a public nuisance in that it interfered with the free navigation of the Ohio River. After some preliminary struggles as to the propriety of the Supreme Court entertaining such an action, the Supreme Court took jurisdiction and appointed former Chancellor Walworth of New York as Referee or Commissioner to take testimony on the questions of fact involved. The learned ex-Chancellor made an extensive inquiry, which led him to the conclusion that the bridge, at least as then constructed, was a public nuisance, because some vessels then operating on the Ohio River could not pass under the bridge without either shortening their funnels or having their funnels so constructed as to permit of their being lowered when passing under the bridge. He therefore recommended that an order be made directing the demolition of the bridge as a public nuisance, unless it be reconstructed by the defendant company so as to permit these vessels to pass under it with their funnels in place as originally constructed.

The last part of the report indicates that the learned ex-Chancellor shrank from the consequences of his main conclusion that the bridge was a public nuisance and ought to be demolished. It also indicates that he had sacrificed the important legal principle involved, in an attempt to arrive at some compromise, as a result of his fear to face the consequences of his own legal conclusions.

In order to understand the full meaning of the principles involved, it must be borne in mind that Chancellor Walworth's main conclusion was based upon the legal theory that the navigation of the Ohio River must be free from interference except by congressional legislation, and that any bridge which interfered with the free navigation of any steamboat having a funnel of any height

was an interference with the free navigation of the river—and therefore a public nuisance liable to be demolished by the order of a federal court. Hence, the suggestion, in his report, that the structure need not be demolished if certain changes in its construction be made, was merely an attempt to avoid the consequences of his own conclusions, at least in one of the possibilities of change suggested by him. The possible changes suggested by him were two: One was to raise the height of the bridge; the other, to transform the bridge into a drawbridge. The suggestion as to raising the height of the bridge was clearly an evasion of the issue. For, if the legal position of the steamboat owners, or the river-traffic men, was correct, every future steamboat-owner or builder would have a right to construct a funnel as high as he pleased, and on the construction of every new funnel of a new height the bridge would have to be raised accordingly-which is, of course, an absurdity. The net result of his decision, therefore, was that the bridge should either be entirely destroyed or turned into a drawbridge. This meant the arrest of all railroad development. Which, in turn, meant the arrest of the entire economic development of the country. Modern railroad development would clearly have been impossible if every railroad bridge over our navigable rivers were required to be a drawbridge, to be opened each time a high-funneled boat had to pass under it.

But ex-Chancellor Walworth's decision was actually adopted by the United States Supreme Court, although by a divided Court; and railroad development would have been stopped but for the action of Congress. The opinion of the Court was delivered by Mr. Justice McLean; Chief Justice Taney and Mr. Justice Daniel

dissenting and writing dissenting opinions.

Judge McLean's decision is a truly amazing piece of work—strongly reminiscent of Mr. Justice Story at his worst. It must be remembered that Judge McLean was an able lawyer, but his ability as a lawyer was of the Story kind—although otherwise he was quite different from the famous Massachusetts jurist. By this we mean that instead of mastering his legal learning, he permitted his legal learning to overwhelm him, with the result that he could not free himself, as Marshall very often did, from the fetters his own legal learning imposed upon him; and he often could not see the real issues because of the obfuscations engendered by the legal tomes which he had occasion to consult in the preparation of his

opinions. Judge McLean's opinion in the Wheeling Bridge Case bears strong resemblance to Judge Story's dissenting opinion in the Charles River Bridge Case. The reader will recall Judge Story's pathetic appeals in that case to "principles over three hundred years old." Judge McLean in the present case had no principles of such great antiquity to appeal to, but he at least could shut his eyes to the future. And he did. The salient points of his decision are contained in the following passages of his opinion:

"The fact that the bridge constitutes a nuisance—says our learned jurist—is ascertained by measurement. The height of the bridge, of the water, and of the chimneys of steamboats, are the principal facts to be ascertained. If the obstruction exists, it is a nuisance. . . .

"On the practicability and safety of lowering the chimneys a great number of witnesses were examined. And the commissioner says, although there was great conflict in the testimony as respects the danger to the limbs and lives of the passengers in the operation, yet, he says, when the facts sworn to are examined, there is a decided preponderance against the safety of lowering the chimneys. . . . The expense of lowering the chimneys, if practicable and safe, would constitute no inconsiderable item."

There follow calculations showing that the annual expense of lowering the chimneys on the seven steamboats then plying on the Ohio River whose chimneys could not pass under the bridge without being lowered amounted to the aggregate sum of \$5,598.60. And then Mr. Justice McLean proceeds to let the cat out of the bag—namely, that he was an adherent of river traffic as against railroad traffic—as follows:

"If viaducts must be thrown over the Ohio for the contemplated railroads, and bridges for the accommodation of the numerous and rising cities upon the banks of the river, it is of the highest importance that they should not be so built as materially to obstruct its commerce. If the obstructions which have been demonstrated to result from the Wheeling Bridge, are to be multiplied as these crossways are needed, our beautiful rivers will, in a great measure, be abandoned. An experience of forty years shows how much may be done in the structure of steamboats, in the improvement of their machinery, and the propelling power, to increase the speed and the comfort of that mode of transportation, under a continued reduction of expense. But if the limit of advance, in this respect, has already been passed, and a retrograde movement is necessary, by rejecting the improvements recom-

mended by ingenuity and experience, we close our eyes to one great source of our prosperity. What would the West now have been if steam had not been introduced upon our rivers, and their navigation had not remained free? Without an outlet for the products of a prolific soil and the instruments of mechanical ingenuity, the country could have made but little advance."

At this point Judge McLean evidently realized that he was treading on dangerous ground in giving up his pseudo-legal argument for an economic one. For even at that time it was already apparent that the railroads had the river steamboats beaten as a factor in the development of the economic resources of the country. If the "beautiful rivers" and the not so beautiful river-traffic were to be saved, evidently arguments of a different sort had to be advanced. And so Mr. Justice McLean reverts again to the Story kind of legal argument, in the delicious manner of that jurist's famous three-centuries-old principles.

"It is said—says Mr. Justice McLean in a passage immediately following upon the one just quoted—that the interest of commerce requires navigable waters to be crossed, and that in such a case the inquiry should be, whether the benefit conferred upon commerce by the cross route, is not greater than the injury done. In the case of The King v. Sir John Morris, 1 Barn. & Adol., 441, it was held, that the injury cannot be balanced against the benefits secured. And in the case of The King v. George Henry Ward, 4 Ad. & El., 384, it was held, where the jury found that an embankment complained of was a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration, it amounted to a verdict of guilty." ²

² It is remarkable how careless even the ablest judges of the United States Supreme Court may sometimes be in the citation of their authorities—not to speak of the use they make of them.

Mr. Justice McLean's statement, quoted in the text, is an instance in point. An examination of the English cases will show that they have not the slightest application to the problem under consideration in the Wheeling Bridge Case. But apart from that—that being the question of the use of these cases—even the statement as to what was held is untrue—at least, in the first case mentioned, that of The King v. Sir John Morris. It is untrue that in that case it was held that the injury cannot be balanced against the benefits secured, as stated by Mr. Justice McLean. We may, therefore, look at these cases a little closer—for they furnish an excellent illustration of what courts and judges mean when they say that they are compelled by established principles of law to decide constitutional questions in a certain way. At the outset it should be noted that the two cases cited were recent English cases, and the second one—the only one in which Mr. Justice McLean's principle can be said to have been applied at all—overruled another case which had been decided a few years before the two cases cited by Mr. Justice McLean. The law on this subject even in its own sphere was, therefore, in a state of flux. But no one could guess that from the way Mr. Justice McLean handles the subject. And now as to the cases, and what they decided.

In the first case, Sir John Morris, the owner of a coal mine, laid a private railway along a public road running from his coal mine to Swansea, a neighboring seaChief Justice Taney, in his dissenting opinion, had no great difficulty in demolishing Mr. Justice McLean's legal as well as his economic arguments, for the learned Judge's law was no better than his economics, notwithstanding his citation of old cases. Neither the legal nor the economic argument is of any present interest; for, happily, Mr. Justice McLean was overruled by Congress, and the matter thus finally disposed of. But there are certain passages in Chief Justice Taney's opinion, as well as in the dissenting opinion of Mr. Justice Daniel, which still deserve perusal, for they go beyond the narrow limits of the case in which they were uttered, and are worth pondering over even now—perhaps particularly now, in view of the stupendous growth of the Judicial Power since the Wheeling Bridge Case was decided.

After Chief Justice Taney had shown that even if the Court were correct in holding that the Wheeling Bridge was a nuisance,

port, for the carrying of his own coal; although he was ready to carry other people's coal for pay. Concededly, this road was not laid in pursuance to any franchise granted to its owner. But it was claimed that it came within a certain general law relating to the subject of the use of public roads. It was this question that was the real point in the case. But in the course of the argument the point was made on behalf of Sir John Morris that, even if the laying of this railroad was not covered by the terms of the statute under which he justified, nevertheless, his railroad was not a nuisance because the advantages resulting therefrom overbalanced the inconveniences. Only one of the judges who wrote opinions in the matter discussed this point—Lord Tenderden, the Chief Justice. And what he said was this:

"But it is said that if such obstruction was created, it might be justified, first on grounds of common law; and, secondly, by statutes. On the first point it was urged, that if the thing complained of furnishes upon the whole a greater convenience to the public than it takes away, no indictment lies for a nuisance. Supposing that doctrine to be sound, which I am not prepared to say, how does it apply in this case? Here is a road for carting down coals to Swansea, and it is for the convenience of an individual, who sends coals there for sale, to make a railway along the public road for their conveyance in waggons. It is said, indeed, that all persons may use this railway who will pay for so doing; but no man has a right to tell the public that they shall discontinue the use of such carriages as they have been accustomed to employ, and adopt another kind, in order to pass along a new description of

road, paying him for the liberty of doing so." It is clear that not only did the case not hold what Mr. Justice McLean says it held, but that the only judge who discussed the subject did not commit himself beyond saying that he was not prepared to accept the contrary doctrine. And it is equally clear that the subject-matter of the case, as well as the course of the argument, was such that the decision could not possibly have any application to a case like the Wheeling Bridge Case. The problem involved in the second case was also of the same private character, and, while the statement of what was held in the case may be technically true, its purport is entirely misleading. An examination of that case will show that the problem—even as to the private obstruction there involved—was not whether any impediment would constitute a nuisance, but whether, the jury having by its verdict found that the obstruction was a nuisance, the mere additional statement by the jury that the inconvenience was counter-balanced by public benefit arising from the alteration, could in any way detract from the force of its verdict. A reading of the case will show that it went off on a technicality. The learned judge who decided the case, Lord Denman, was evidently of the opinion that the verdict of nuisance in itself contained a finding that the public was inconvenienced by the maintenance of the private obstruction in question. And since

it was not within the power of the Federal Courts to interfere in the matter, because of the absence of congressional legislation on the subject, he remarked:

"In taking jurisdiction, as the law now stands, we must exercise a broad and undefinable discretion, without any certain and safe rule to guide us. And such a discretion, when men of science differ, when we are to consider the amount and value of trade, and the number of travelers on and across the stream, the interests of communities and states sometimes supposed to be conflicting, and the proper height and form of steamboat chimneys, such a discretion appears to me much more appropriately to belong to the Legislature than to the Judiciary."

Mr. Justice Daniel commences his dissenting opinion with the following statement:

"In entering upon the consideration of the case before us, the mind is at once impressed with the belief that there never has been, that there perhaps never can be brought before this tribunal, for its decision, a case of higher importance or of deeper interest than the present."

He then discusses the questions involved at some length, coming to the conclusion, as did Chief Justice Taney, that the Court was actually called upon to legislate, and he thereupon adds his protest to that of the Chief Justice against the assumption by the Court of legislative powers. Only, as was his wont, he put his protest in somewhat stronger language. Said he:

"I ask upon what foundation the courts of the United States, limited and circumscribed as they are by the Constitution, and by the laws which have created them and defined their jurisdiction,

the public could only be inconvenienced if the balance was on the side of inconvenience, the general verdict contradicted the statement—and since "the verdict was the thing," the statement ought to be disregarded. For he specifically held that a mere "impediment" did not amount to a nuisance.

Again it must be remembered that the obstruction involved in that case was a purely private one, and Lord Denman had a perfect right to assume that if it were really of public convenience, there would have been some action by some public body legalizing it, and that it was not for the individual to decide on the balance of the convenience. And since the public—represented by the jury—in its official capacity found that the obstruction was a nuisance, the mere additional statement, which might, in a certain sense, be considered the private opinion of the jurors, could not detract from the formal verdict. This obscure case and more obscure decision of a purely private matter, in a country where any error of a court can be easily corrected by the legislature, is made, in this country, the basis of a Supreme Court decision on a great constitutional question; and subsequently, this decision is made the basis of an attempt to declare a law of Congress unconstitutional. And it is by sheer accident and great good fortune that the country has escaped the appalling consequences of that decision.

can, upon any speculations of public policy, assume to themselves the authority and functions of the Legislative Department of the government, alone clothed with those functions by the Constitution and laws, and undertake, of their mere will, to supply the omissions of that department? Is it either in the language or theory of the Constitution, that this court shall exercise such an auxiliary or rather guardian and paramount authority? Cannot the Legislative Department of the government be intrusted with the fulfillment of its peculiar duties? Such an act as this court has been called upon to perform; such an act as it has just announced as its own, is, in my opinion, virtually an act of legislation, or, in stricter propriety (I say it not in an offensive sense), an act of usurpation.

Mr. Justice Daniel then takes this fling at the logic of the majority of the Court as expressed in Mr. Justice McLean's opinion:

"This may possibly be logic, irrefragable logic; and the failure to comprehend its consistency may arise from the infirmity of my own perceptions; but I cannot help suspecting, that an acumen, far surpassing any to which I will lay claim, would be puzzled to reconcile this process with the laws of induction, as prescribed by Watts, by Duncan, or by Kames."

He then pays his respects to the learned ex-Chancellor of New York, showing that the Commissioner's procedure "betrays a bias, however honest" in favor of the river-traffic side of the controversy. After these preliminaries he proceeds to examine the entire law of the subject, citing numerous decisions, some of them at least as old as those cited by Mr. Justice McLean—all of which lead him to the conclusion that the majority of the Court was as wrong on the law as it was wrong in its economics. He then concludes his opinion as follows:

"Seeing that the Commonwealth of Virginia, within whose territory and jurisdiction the Wheeling Bridge has been erected, has authorized and approved the erection of that bridge; and the United States, under the pretext of whose authority this suit has been instituted, have by no act of theirs forbidden its erection, and do not now claim to have it abated; my opinion, upon the best lights I have been able to bring to this case, is, that the bill of the complainant should be dismissed. From these convictions, and from the sense I entertain of the almost incalculable importance of the decision of the majority of the court in this case, I find myself constrained solemnly to dissent from that decision."

Within six months after this decision was rendered, the United States—"under the pretext of whose authority this suit has been

instituted"—to quote Mr. Justice Daniel—acting through Congress, decided that the Wheeling Bridge which the United States Supreme Court had so solemnly declared to be a public nuisance was in fact a public benefit, and legalized its continuance in the form in which it was constructed. And the United States Supreme Court subsequently upheld the constitutionality of this act of Congress on the theory that Congress had ample power under the Constitution to regulate the navigation of the Ohio River, and therefore to declare what is and what is not such an obstruction to its navigation as to constitute a public nuisance.

This unique case had a curious aftermath—which is still interesting in many respects, and is therefore worth noticing here. The decision of the Supreme Court was rendered in February, 1852, and a formal decree embodying its terms was entered in May following. In August of the same year Congress passed the law already referred to, which annulled the effect of the decision. This law went into effect on August 31, 1852, and its important

provisions were as follows:

"That the bridges across the Ohio River at Wheeling, in the State of Virginia, and at Bridgeport, in the State of Ohio, abutting on Zane's Island, in said river, are hereby declared to be lawful structures, in their present position and elevation, and shall be so held and taken to be, anything in any law or laws of the United

States to the contrary, notwithstanding.

"That the said bridges are declared to be and are established post roads for the passage of the mails of the United States, and that the Wheeling and Belmont Bridge Company are authorized to have and maintain their said bridges at their present site and elevation; and the officers and crews of all vessels and boats navigating said river are required to regulate the use of their said vessels and boats and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation and construction of said bridges."

The partisans of river traffic, and particularly the citizens of Pittsburgh, and other Pennsylvanians, who thought that their interests were adversely affected by this legislation, raised the cry that Congress had attempted to overrule a decision of the United States Supreme Court—conveniently overlooking the fact that the decision of the Supreme Court itself was based on the assumption that Congress had exclusive power to regulate the traffic on the Ohio River, which, of course, included the power to declare

what is and what is not an interference with the traffic. Under cover of the cry of unconstitutionality of this Act of Congress, an attempt was made to execute the decree of the Supreme Court directing the abatement of the alleged nuisance—that is, the removal of the bridge-notwithstanding the Act of Congress, but it seems that no judge of the Supreme Court could be induced to thus challenge the power of Congress. While efforts were being made in that direction, the bridge was destroyed by an accident. The bridge company thereupon immediately set about constructing a new bridge designed practically as was the old one, disregarding the decision of the Supreme Court in reliance upon the Act of Congress. This situation was thought to present a favorable opportunity by the enemies of the bridge, and they made application to Justice Grier of the Supreme Court, who was a native of Pennsylvania and resident of Pittsburgh, for an injunction restraining the bridge company from re-erecting the bridge. Justice Grier issued an order to show cause, directing the Bridge Company to show cause before him why it should not be restrained from erecting a new bridge in violation of the decision of the United States Supreme Court. It seems that Judge Grier saw a practical difference—although he would have been hard put to it to find a legal distinction—between ordering the demolition of the bridge after Congress had declared it to be a legal structure and issuing an injunction restraining the Bridge Company from re-erecting the bridge after it had been destroyed by the elements. The Bridge Company lightened Judge Grier's task by disregarding the order to show cause, and refusing to appear and defend. Judge Grier thereupon issued the injunction prayed for by the opponents of the Bridge Company. But the Bridge Company defied Justice Grier's injunction, and proceeded with the erection of the bridge. The new phase of this litigation came to a head when the opponents of the bridge made a motion to punish the Bridge Company for contempt of Court for violating Justice Grier's injunction. This motion brought up the entire question: the constitutionality of the Act of Congress and its effect upon the judgment of the Supreme Court, as well as the propriety of Justice Grier's injunction and the liability of the Bridge Company to punishment for contempt for its violation.

This phase of the case was argued in the United States Supreme Court on December 15, 1855, and the decision was rendered

on April 21, 1856. The decision upheld the constitutionality of the law by a vote of six to three—Judges McLean, Wayne and Grier dissenting. The majority which held the Act of Congress constitutional also held the injunction made by Justice Grier improper, and it was dissolved. But two of the members of the majority, Judges Nelson and Curtis, were of the opinion that the defendant company should be punished for contempt of court, notwithstanding the fact that the Act of Congress was constitutional and that Justice Grier's injunction was improperly issued. And the Bridge Company was only saved from actually being punished for disobeying an invalid injunction in reliance on a valid act of Congress by the fact that Judge McLean, who delivered the original opinion of the Court which necessitated the act of Congress and who now delivered the chief dissenting opinion, could not see the propriety of punishing the Bridge Company for disobeying an illegal injunction. He therefore voted against the punishment of the Bridge Company for contempt, although he held that the act of Congress was unconstitutional and Justice Grier's injunction valid and binding. This situation as to the curious position of Judges Nelson and Curtis on the one hand, and Judge McLean on the other, is still of great interest in connection with the problem of injunctions and contempt of court for violation thereof—a subject which is not only ever present, but of increasing importance. It is not, however, directly connected with our subject, so we shall not go into it. What is, however, of direct importance to us, and should be noticed here, is the fact that this is the first case prior to the Dred Scott Case in which judges of the United States Supreme Court actually voted to declare an act of Congress unconstitutional. The act in question was not, however, a general law, but in the nature of a private act; and the reason given by the judges for holding the act unconstitutional was not the general one involved in declaring laws unconstitutional but the special one that the act was an attempt to override a specific decision of the Supreme Court, and, was, therefore, not really an act of legislation but an attempt on the part of Congress to exercise judicial functions. The substance of the decision in the case (Pennsylvania v. The Wheeling and Belmont Bridge Company; 18 Howard, 421) is thus summarized in the official reporter's headnote:

"An Act of Congress, that a certain bridge across the Ohio River is 'declared to be a lawful structure, and shall be so held and taken to be, anything in the laws of the United States to the contrary notwithstanding,' supersedes the effect and operation of the decree of the court previously rendered, declaring it an obstruction to navigation and directing its removal.

"Congress cannot annul a judgment of the court upon the private rights of parties, but can one founded on the unlawful interference with the enjoyment of a public right which is under

the regulation of Congress."

The decision in this case again clearly brought out the fact that whatever attempts may have been made to refer the decision to legal principles to clothe it in legal terms, the real point was an economic one, or a political one based upon economic considerations. It will be recalled that Mr. Justice McLean's opinion in the main case was based on the proposition that Congress had the sole regulation of commerce on the Ohio River, and that therefore any interference with the navigation of the river without authority of Congress was an obstruction of its free navigation and therefore a public nuisance. When Congress, however, passed the Act of August 31, 1852, it would seem that there was no room for further argument, and all of the judges should have agreed that the structure was a lawful one. But three of the judges persisted in declaring the bridge to be a nuisance, and Mr. Justice McLean wrote a long and involved opinion trying to find a new legal reason in support of his old economic views. That the real moving force was economic is demonstrated in the following passage from his dissenting opinion in the second Wheeling Bridge Case, which clearly would have no room in his opinion if it were a purely legal one. This passage gives away the real motive force behind his decision:

"The principle involved in this case—says he—is of the deepest interest to the commerce of the West. The Mississippi River and its tributaries, water a country unsurpassed, if equalled, in the world, in extent and fertility. But if the obstruction of the Wheeling bridge may be repeated wherever the crossing public shall think proper to build a bridge, one third of the internal commerce of the Union will be materially obstructed. The injury of such a regulation would be very limited in the Atlantic States, as there the rivers are short, and navigation is generally limited to the ebb and flow of the tide. If the Wheeling bridge be a legal structure, hundreds of bridges on the same principle may be

thrown over the Mississippi and its navigable tributaries, to the great and remediless injury of western commerce."

Mr. Justice Daniel took the occasion to write another one of his very interesting opinions, this time a concurring one. It seems that he was not satisfied with the opinion delivered on behalf of the majority by Mr. Justice Nelson, which was rather colorless. He, therefore, took occasion to express his own views on the entire controversy, which included some very suggestive remarks as to the action of Mr. Justice Grier in issuing the injunction attempting to carry out the original decree of the Court in the face of the act of Congress superseding it. He introduces his opinion with the following remarks:

"In the decision of the court dissolving the injunction and refusing the coercive measures asked for in this case, I entirely concur. But as in the argument by which the court have proceeded to their conclusions, important questions of constitutional law appear to me to have been, some of them, passed over without consideration, and others inaccurately expounded, convictions of duty impel me to express my own interpretation of those questions."

He refers disapprovingly to the very manner in which the Supreme Court originally assumed jurisdiction of the case, saying:

"When the controversy now revived before us, was, in January, 1850, for the first time brought to our attention, there suggested themselves to my mind serious difficulties with respect both to the authority and the mode by which it was attempted to place that controversy within the cognizance of this tribunal."

He then proceeds to summarize his views of Mr. Justice Grier's injunction-order in the following forceful language:

"This mandate, therefore, was itself a palpable violation of the decree of this court, and of rights reserved to the defendants by that decree—rights which they twice evinced their readiness to vindicate before this court, in opposition to the reiterated, but subsequently abandoned, attempts by the complainant to assail them."

And he winds up his opinion by summarizing the legal problems involved in the present case, but including the unavoidable allusion to the economic forces behind the legal fencing. The concluding passages, which we shall quote at length, are as follows:

"Against the effect of these very explicit enactments, it has been contended that they are void, because, as it is said, they reverse a decision of this court, which Congress has no power to do. In answer to this argument, it may be conceded that the position assumed by it might be true with reference to the adjustment or security of private rights vested under previously existing laws or adjudications; but such a position is wholly inapplicable to measures of public policy falling appropriately within the legislative competency, and much less can it have any influence to warrant in any other department of the government the exercise

of powers vested exclusively in the national Legislature.

"It is impossible to read either the original or the modified decree, by the majority of the court in this cause, without perceiving that both these decrees, as well as the entire argument in support of them, were based upon the single assumption that the erection of the suspension bridge at Wheeling was an interference with the right to regulate commerce vested in Congress by the Constitution. It is equally manifest, from the arguments and opinions of the minority of the court, that the right in Congress to regulate commerce is not only conceded by the minority, but the exclusiveness of that power in Congress is insisted upon. These later opinions maintain the doctrine that Congress alone are competent to exercise this right or power, and can neither be controlled nor anticipated with respect to it by the Judicial Department, upon any fancied necessity, nor upon any supposed neglect, or omission, or incompetency, which the latter may impute to Congress, and may imagine the Judicial Department called upon to remedy.

"In these views are seen essentially, nay, explicitly, the diversity existing in the opinions of the majority and minority of

the judges, as declared in this case.

"Congress have, by statute already referred to, undertaken to regulate the commerce upon the Ohio River, so far as the matters involved in this controversy are concerned. And who shall question their power to do this? Does it belong to this court, under any article or clause of the Constitution, or of any statute, to assume such superiority? Congress have ordained that the vehicles of commerce on the Ohio, the steamboats, shall so graduate the height of their chimneys as not to interfere with the bridges at Wheeling, as existing at the date of the Statute. By this they have at least declared that these bridges are deemed by them no invasion, either of the power or the policy of Congress with reference to the commerce of the Ohio River. They have regulated this matter upon a scale by them conceived to be just and impartial, with reference to that commerce which pursues the course of the river, and to that which traverses its channel, and is broadly diffused through the country.

"They have, at the same time, by what they have done, secured to the government, and to the public at large, the essential advantage of a safe and certain transit over the Ohio—an advantage which, previously to the erection of the Wheeling bridge, was

greatly desired but never attained.

"In what has been done by Congress, I can have no doubt that they have acted wisely, justly, and strictly within their constitutional competency. By their action they have completely overthrown every foundation upon which the decrees of this court, the orders of the circuit judge, and every motion purporting to be based upon these or either of them, could rest. I am, therefore, of the opinion that each and every motion submitted by the complainant under color of the decrees heretofore pronounced in this cause, or of the injunction awarded by the Judge of the Circuit Court, should be overruled; that the injunction awarded as aforesaid should be dissolved, and the bill praying for that injunction should be decreed their costs."

It is perhaps fortunate for the country that this momentous economic problem arose at a time when the Judicial Power was not what it is now, and when both in Congress and on the Bench men could be found who, perhaps for varying reasons, were ready to defy the onward march of the Judicial Power. And it is a matter of interesting speculation, and of no little concern, as to what would be the outcome of such a contest, and its possible consequences, if such a contest were to arise today—when the legal profession at least seems to be ready to sacrifice everything on the altar of the Judicial Power.

CHAPTER XVIII

THE MEANING OF THE CONSTITUTION

USTICE HARLAN, in his dissenting opinion in Downes v. Bidwell, to be discussed at some length in the further course of this work, said, with great emphasis: "The meaning of the Constitution cannot depend upon accidental circumstances arising out of the products of other countries, or of this country." And other members of the Supreme Court, as well as the Court as a whole, have repeatedly declared that the meaning of the Constitution is unchangeable. Indeed, this is the foundation upon which the entire structure of the Judicial Power is built. But an examination of our judicial history will show that no statement with respect to our government is less warranted, or less able to stand the test of careful scrutiny. This test is, however, of so complicated and arduous a nature, requiring as it does a close study of our entire judicial history, that but few are able to apply it for themselves; with the result that we are in this respect dependent more or less on what may be called "expert testimony." And expert testimony is both rare and inaccessible to the lay reader. Hence the erroneous notions on the subject which are generally prevalent.

But there is one incident in our judicial history which strikingly illustrates the error—to put it mildly—of this assertion; and which furnishes the proof in a manner which does not require technical equipment for its understanding. This incident occurred during the period now under consideration, and is contained in the last of the seven cases referred to above. We shall therefore discuss this case at some length, even though it does not concern itself directly with the problem of judicial supervision over the

legislative department, which is our special concern.

Few lawyers have ever heard of the case of Genesee Chief v. Fitzhugh or of its companion, Jackson v. Steamboat Magnolia. Needless to say, few laymen have ever heard of these cases. The

ordinary histories do not refer to them. And even the special historians do not make any particular fuss over them, if they mention them at all. But they have played quite an important part in our constitutional history, and therefore in the history of the development of our country. And there are few cases which better illustrate the question of the "meaning" of the Constitution, and therefore, indirectly, the real meaning of the Judicial Power, which means of our real government.

The first of these cases was decided in 1851, and its full title is The Propeller Genesee Chief et al. v. Fitzhugh et al. (12 Howard, 443). The constitutional principle decided in the case, as stated by the official court reporter, is, that "the admiralty and maritime jurisdiction granted to the Federal Government by the Constitution of the United States is not limited to tide waters, but extends to all public navigable lakes and rivers, where commerce is carried on between different states, or with a foreign nation." And the special point decided was that cases involving accidents on inland

waters are cognizable in the Federal courts.

To us of the present day, who are used to all kinds of suits being brought in the Federal courts, including those involving such purely local questions as whether a street railway in a certain city should charge a five-cent or a seven-cent fare, the question of what kinds of actions are cognizable in the Federal courts seems of little constitutional importance. Like the gentleman in Moliére's famous comedy, who was startled to hear that he had been speaking prose for forty years, we may be startled to find that we have been speaking a special Federal language for about the same length of time, but that there are other forms of speech, and that there was a time when ordinary actions were not usually tried in Federal courts—when to try a case in a Federal court was the unusual rather than the ordinary thing. We have spoken the Federal language too long to feel that there is anything strange about it; but there was a time when it was a strange language to the average American. A sacred tongue, perhaps, but not a tongue to be used every day in the common and ordinary pursuits of life.

This particular question of the admiralty jurisdiction of the Federal courts had been decided adversely to the power of those courts by a series of cases decided by the United States Supreme Court itself in the early part of the nineteenth century,

when Marshall was the presiding genius and Story the legal expert of that Court. The last of these adjudications was in the case of The Steamboat Thomas Jefferson, decided in 1825, (10 Wheaton, 428). The decision in the Genesee Chief Case therefore came as a surprise to the profession and the community, and was the result of a serious struggle within the Supreme Court itself, and the defeated party within that Court did not give up the fight after this first defeat, but resumed the struggle when the question was again presented in 1858 in Jackson v. Steamboat Magnolia, (20 Howard, p. 296)

In the Genesee Chief Case Chief Justice Taney wrote the prevailing opinion, and his reasoning is extremely interesting, as showing what that able jurist and statesman thought on the subject of the meaning of the Constitution of the United States. We shall therefore quote liberally from his opinion. Said he:

"The proceeding is in rem, and in substance as well as in form, a proceeding in admiralty. It was instituted under the Act of February 26th, 1845 (5 Stat. at Large, 726), extending the jurisdiction of the District Courts to certain cases upon the lakes and navigable waters connecting the same. The District Court decreed in favor of the libelants, and the decision was affirmed in the Circuit Court, from which last-mentioned decree this appeal has been taken.

"Before, however, we can look into the merits of the dispute there is a question of jurisdiction which meets us at the threshold. When the Act of Congress was passed, under which these proceedings were had, serious doubts were entertained of its constitutionality. The language and decision of this court, whenever a question of admiralty jurisdiction had come before it, seemed to imply that under the Constitution of the United States, the jurisdiction was confined to tide waters. Yet the conviction that this definition of admiralty powers was narrower than the Constitution contemplated, has been growing stronger every day with the growing commerce on the lakes and navigable rivers of the western States. And the difficulties which the language and decisions of this court had thrown in the way, of extending it to these waters, have perhaps led to the inquiry whether the law in question could not be supported under the power granted to Congress to regulate commerce. This proposition has been maintained in a recent work upon the jurisdiction, law, and practice of the courts of the United States in admiralty and maritime causes, which is entitled to much respect, and the same ground has been taken in the argument of the case before us.

"The law, however, contains no regulations of commerce; nor

any provision in relation to shipping and navigation on the lakes. It merely confers a new jurisdiction on the District Courts; and this is its only object and purpose. . . .

"Indeed, it would be inconsistent with the plain and ordinary meaning of words, to call a law defining the jurisdiction of certain

courts of the United States a regulation of commerce. . . .

"And the limits fixed by the Constitution to the judicial authority of the courts of the United States, would form an insuperable objection to this law, if its validity depended upon

the commercial powers. . .

"But if the admiralty jurisdiction is confined to tide water, the courts of the United States can exercise over the waters in question nothing more than ordinary jurisdiction in cases at common law and equity. And in cases of this description they have no jurisdiction, if the parties are citizens of the same state. This being an express limitation in the grant of judicial power, no Act of Congress can enlarge it. And if the validity of the Act of 1845 depended upon the power to regulate commerce, it would be unconstitutional, and could confer no authority on the District Courts.

"If this law, therefore, is constitutional, it must be supported on the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction, as known and understood in the United States when the Consti-

tution was adopted.

"If the meaning of these terms was now for the first time brought before this court for consideration, there could, we think, be no hesitation in saying that the lakes and their connecting waters were embraced in them. These lakes are in truth inland seas. Different states border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different states and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the Admiralty Court to administer international law, and if the one cannot be established, neither can the other. . . .

"The only objection made to this jurisdiction is that there is no tide in the lakes or the waters connecting them; and it is said that the admiralty and maritime jurisdiction, as known and understood in England and this country at the time the Constitution

was adopted, was confined to the ebb and flow of the tide.

"Now, there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty juris-

diction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason;

and, indeed, would seem to be inconsistent with it.

"In England, undoubtedly, the writers upon the subject, and the decisions in its courts of admiralty, always speak of the jurisdiction as confined to tide water. And this definition in England was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide; nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter or depart with cargoes. In England, therefore, tide water and navigable water are synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is

confined to public navigable waters.

"At the time the Constitution of the United States was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here. In the old thirteen States the far greater part of the navigable waters are tide waters. And in the states which were at that period in any degree commercial, and where courts of admiralty were called on to exercise their jurisdiction, every public river was tide water to the head of navigation. And, indeed, until the discovery of steamboats, there could be nothing like foreign commerce upon waters with an unchanging current resisting the upward passage. The courts of the United States, therefore, naturally adopted the English mode of defining a public river, and consequently the boundary of admiralty jurisdiction. It measured it by tide water. And that definition having found its way into our courts, became, after a time, the familiar mode of describing a public river, and was repeated as cases occurred, without particularly examining whether it was as universally applicable in this country as it was in England. If there were no waters in the United States which are public, as contradistinguished from private, except where there is tide, then unquestionably here as well as in England, tide water must be the limit of admiralty power. And as the English definition was adopted in our courts, and constantly used in judicial proceedings and forms of pleading, borrowed from England, the public character of the river was in process of time lost sight of, and the jurisdic-

tion of the admiralty treated as if it was limited by the tide. The description of a public navigable river was substituted in the place of the thing intended to be described. And under the natural influence of precedents and established forms, a definition originally correct was adhered to and acted on, after it had ceased, from a change in circumstances, to be the true description of public waters. It was under the influence of these precedents and this usage, that the case of The Thomas Jefferson, 10 Wheat., 428, was decided in this court; and the jurisdiction of the courts of admiralty of the United States declared to be limited to the ebb and flow of the tide. The Steamboat Orleans v. Phoebus, 11 Pet., 175, afterwards followed this case, merely as a point decided.

"It is the decision in the case of The Thomas Jefferson which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced that, if we follow it, we follow an erroneous decision into which the court fell, when the great importance of the question as it now presents itself could not be foreseen; and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent man who presided here when that case was decided. For the decision was made in 1825, when the commerce on the rivers of the west and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of

the present day. . . .

"It is evident that a definition that would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tide water, which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States."

There can be little doubt that, from the point of view of statesmanship, the argument of the great Chief Justice is unanswerable. The only difficulty is that statesmanship is a question of politics and not of law. It will be recalled that Mr. Gerry, one of the Framers who is usually cited by upholders of the judicial review as one of those who intended to put the Judicial Power into the Constitution, expressly objected to the judges being statesmen, considering that the functions of judge and statesman are incompatible. And the question here presented, at least from the

official point of view, was not, whether from the point of view of statesmanship the Federal admiralty courts should have cognizance of cases occurring on the inland water ways of the country, but, whether the admiralty courts of the United States had such power, i.e., whether that power had been granted in the Constitution. And on the latter point there could be no question but that the answer must be in the negative.

Indeed, Chief Justice Taney admits the point himself when he says that at the time of the adoption of the United States Constitution maritime or admiralty jurisdiction, as understood in this country, was limited to tide waters. That this understanding was too narrow for the circumstances of life upon this continent as they developed subsequent to the adoption of the Constitution is entirely beyond the point. According to the Chief Justice himself, there is no question that the narrower meaning of admiralty jurisdiction was the accepted one at the time of the adoption of the Constitution. It was, in fact, the only one known to the Framers of the Constitution. It was the only one with which they were familiar from English history, and it was the only one with which this new world was familiar, as the conditions of the thirteen colonies were in this respect a duplication of those prevailing in England. There can, therefore, be no doubt that when the Framers spoke of admiralty jurisdiction in connection with the Federal courts they had in mind the only admiralty jurisdiction known to them. Hence, this is the only admiralty jurisdiction which they could have granted to the Federal courts.

The arguments of the Chief Justice for the extension admiralty jurisdiction were assuredly very cogent, and if addressed to statesmen they were indubitably valid and of very great weight. And if we were unfettered by a constitutional theory which seeks to perpetuate the congealed wisdom of 1787, it would be permissible for either legislature or courts to be guided in this matter by reasons of statesmanship, and then Chief Justice Taney's arguments would be decisive. Unfortunately, according to our official theory, we do not live under such a government. According to our official theory, the hands of the people and of the statesmen who represent them are tied in such matters by the views of the subject held by the Framers of the Constitution. And the Supreme Court has held again and again, when the action of our statesmen were up for review, that it is the opinion of the Framers of the

Constitution in 1787 that counts in such matters and not the

present-day opinion of the people or their statesmen.

This official theory was well stated by Mr. Justice Harlan in Downes v. Bidwell when he said that the meaning of the Constitution cannot depend upon the accident of production in some foreign countries, or in this country. According to this theory, the meaning of the Constitution is the meaning put into it in 1787. Clearly, to paraphrase Mr. Justice Harlan, the accident of the growth of our country and the expansion of our commerce so as to include commerce on the Great Lakes and the navigable rivers of the West could not change the meaning of the Constitution as it comes from the hands of its Framers.

This is the point of view taken by Mr. Justice Daniel in his dissenting opinion in the Genesee Chief Case. Said he:

"It is admitted that by the decisions in England, the jurisdiction of the admiralty did not reach infra corpus comitatus, and was limited to the ebb and flow of the tide; and it is admitted that by the previous decisions of this court the like limitations were imposed on the jurisdiction of the admiralty in this country; and even this limitation, imposed by former decisions of this tribunal, it is obvious, allowed of some encroachment upon the common law jurisdiction, in so far as the ebb and flow of the tide might bring the asserted power of the court infra fauces terrae, or infra corpus comitatus. But even this encroachment is not sufficient to satisfy the aspirations of the jurisdiction, now for the first time asserted; for now it is insisted that any waters, however they may be within the body of a state or county, are the peculiar province of the admiralty power; and although it is admitted that the power was once clearly understood as being limited to the ebb and flow of the tide, yet now, without there having been engrafted any new provision on the Constitution, without the alteration of one letter of that instrument, designed to be the charter of all federal power, the jurisdiction of the admiralty is to be measured by miles, and by the extent of territory which may have been subsequently acquired; a much less natural standard, surely, than the nature and character of the element to which the admiralty is peculiarly adapted, and to which it owes its origin; that the Constitution may, nay must be altered by the same process, and must be enlarged, not by amendment in the modes provided, but according to the opinions of the judiciary, entertained upon their views of expediency and necessity. My opinions may be deemed to be contracted and antiquated, unsuited to the day in which we live, but they are founded upon

deliberate conviction as to the nature and objects of limited government, and by myself at least cannot be disregarded; and I have at least the consolation—no small one it must be admitted -of the support of Marshall, Kent, and Story in any error I may have committed. I cannot construe the Constitution either by mere geographical considerations; cannot stretch nor contract it in order to adapt it to such limits, but must interpret it by my solemn convictions of the meaning of its terms, and by what is believed to have been the understanding of those by whom it has been formed."

In the case of Jackson v. Steamboat Magnolia the prevailing opinion was written by Mr. Justice Grier. It is in general merely a repetition of Chief Justice Taney's argument in the Genesee Chief Case.

Mr. Justice McLean wrote a concurring opinion, from which we quote the following passages as worthy of notice in our connection:

"This jurisdiction—says he—was limited in England to the ebb and flow of the tide, as their rivers were navigable only as far as the tide flowed. And as in this country the rivers falling into the Atlantic were not navigable above tide-water, the same rule was applied. And when the question of jurisdiction was first raised in regard to our western rivers, the same rule was adopted, when there was no reason for its restriction to tidewater, as in the rivers of the Atlantic. And this shows that the most learned and able judges may, from the force of precedent, apply an established rule where the reason or necessity on which it was founded fails. .

"It is singular, that while the English Admiralty, by its extension, has been placed substantially upon the same basis as our own, ours should be denounced as having a dangerous tendency upon our interests and institutions, and a desire expressed to abandon the enlightened rules of the civil law, and follow the

misconstrued Statutes of Richard II.

"Antiquity has its charms, as it is rarely found in the common walks of professional life; but it may be doubted whether wisdom is not more frequently found in experience and the gradual progress of human affairs; and this is especially the case in all systems of jurisprudence which are matured by the progress of human knowledge. Whether it be common, chancery, or admiralty law, we should be more instructed by studying its present adaptations to human concerns, than to trace it back to its beginnings. Everyone is more interested and delighted to look upon the majestic

and flowing river, than by following its current upwards until it becomes lost in its mountain rivulets."1

Mr. Justice Daniel again wrote a very vigorous dissenting opinion, and so did Mr. Justice Campbell. The minority of the court was even more strenuous now than when the Genesee Case was decided—a rather unusual phenomenon in judicial history, as the opposition of the minority usually lessens with the passing of time. Mr. Justice Daniel begins his opinion with a solemn protest, saying:

"Against the opinion of the court in this cause, and the doctrines assumed in its support, I feel constrained solemnly to protest.

"If in the results which have heretofore attended repeated efforts on my part to assert what are regarded both as the sacred authority of the Constitution and the venerable dictates of the law were to be sought the incentive to this remonstrance, this act might appear to be without motive; for it cannot be denied that to earnest and successive remonstrances have succeeded still wider departures from restrictions previously recognized, until in the case before us every limit upon power, save those which judicial discretion or the propensity of the court may think proper to impose, is now cast aside. But it is felt that in the discharge of official obligation there may be motives much higher than either the prospect or the attainment of success can supply; and it may be accepted as a moral axiom, that he who, under convictions of duty, cannot steadily oppose his exertions, though feeble and unaided, to the march of power, when believed to be wrongful, however overshadowing it may appear, must be an unsafe depositary of either public or private confidence. My convictions

1 Judge McLean, who was not only a good lawyer but also a statesman of parts, could, on occasion, see the absurdity of looking to statutes of Richard II, or court decisions of the same vintage, for guidance in modern America. But when it suited his purpose, he could join his brother Story in appealing to antiquity for its wisdom, instead of merely contemplating its charms. Witness his opinion in the Wheeling Bridge Case. Also, Judge McLean conveniently forgot that he was not dealing with a rule of law, but with the United States Constitution, and that the real question was not, which of the two rules of law in question would be more reasonable under our conditions, but, rather, what the Constitution said on the subject. At least, that should have been his inquiry according to our official theory. It should be noted, however, in extenuation of Mr. Justice McLean's conduct, that in practice the Supreme Court very seldom distinguishes between rules of law, which it can make and unmake, and the United States Constitution, by which it is supposed to be governed. As a result, we never know, can never know, under what kind of a constitution

we live—whether under that of 1787 or under one of a more modern coinage. Or, rather, we know that it is and will be of modern coinage, but we can never tell whether the coins which come out from the mint at any term of court will be of modern design, or a mere re-issue of the coinage of George III or of one of his illustrious predecessors—perhaps the same Richard II of whom Judge McLean speaks

so slightingly in the passage quoted in the text.

pledge me to an unyielding condemnation of pretensions once denominated, by a distinguished member of this court, 'the silent and stealing progress of the admiralty in acquiring jurisdiction to which it has no pretensions;' and still more inflexibly of the fearful and tremendous assumptions of power now openly proclaimed for tribunals pronounced by the venerable Hale, by Coke, and by Blackstone, and by the authorities avouched for their opinions, to have been merely tolerated by, and always subordinate to, the authority of the common law—an usurpation licensed to overturn the most inveterate principles of that law; licensed in its exercise to invade the jurisdiction of sovereign communities, and to defy and abrogate the most vital immunities of their social or political organization. I cannot, without a sense of delinquency, omit any occasion of protesting against what to my mind is an abuse of the greatest magnitude, and one which, hopeless as at present the prospect of remedy may appear, it would seem could require nothing but attention to its character and tendencies to insure a corrective. It must of necessity be resisted in practice, as wholly irreconcilable with every guarantee of the rights of person or property, or with the power of internal police in the states."

Mr. Justice Daniel then proceeds with an exposition of the admiralty jurisdiction as understood in the country prior to the decision of Genesee Chief v. Fitzhugh, leaning heavily on the authority of Chancellor Kent. He then pays his respects to the decision in the Genesee Chief Case in the following rather remarkable language:

"Let us now take a view of the claims advanced for the admiralty power, in its constant attempts at encroachment upon the principles and genius of the common law, and of our republican and peculiar institutions, at least from the decision in the case of The Thomas Jefferson, in 10 Wheat., p. 428, to that of The Genesee Chief v. Fitzhugh, in 12 How., 443, inclusive; this last case, to my apprehension, more remarkable and more startling as an assumption of judicial power than any which the judicial history of the country has hitherto disclosed, prior to the case now under consideration."

He goes into a lengthy examination of this branch of the law in England, and then turns his attention to the case of The Thomas Jefferson, of which he says:

"Under such a state of the admiralty law, conceded to be the law of England, and as I contend, the law of the United States, came before this court for decision the case of *The Thomas Jefferson*, in 10 Wheat., p. 428. In this case, not a single ingredient

required by the English cases to give jurisdiction, existed. It could, by no possibility or by any propriety of language, be styled maritime, as every fact it presented occurred at the distance of a thousand miles from the ocean, and it could not be found that there ever existed a tide in the water-course on which the occurrences that produced the suit originated. Yet, in the absence of these essential ingredients of admiralty jurisdiction, the court, with that greed for power by which courts are so often impelled beyond the line of strict propriety, makes a query, whether, under the show of regulating commerce, Congress might not assert a distinctive and original authority, viz.: the power of the admiralty. The court, however, felt itself constrained to concede the necessity of a locality within the ebb and flow of the tide, and for the want of that requisite to deny jurisdiction."

He then pays his respects to another decision in the following interesting language:

"In the case—says he—of Peyroux v. Howard, 7 Pet., 324, the necessity for the ebb and flow of the tide to give jurisdiction is equally conceded; but the court, in order to maintain its power, deems itself authorized to appeal virtute officii, not to the attraction of the moon, the received philosophic explanation of this phenomenon, but to the current of the Mississippi, which, in precipitating itself upon the waters of the Gulf, occasions, they say, by conflict with the latter, some changes in the rise and fall of the river at New Orleans. This judicial theory of the tides possesses at least the characteristic of novelty. Whether it will be accepted, and find a place in the annals of scientific discovery, may admit of some doubt."

And then examines some more decisions of the United States Supreme Court as well as some Congressional legislation, including the Act of 1845 under which the Genesee Chief Case arose, and reaches the following conclusions:

"The repeated and explicit decisions of this court already cited, and the Act of Congress of 1845, might, it is supposed, have been regarded as some earnest of uniformity and certainty in defining the admiralty jurisprudence of the United States, at least upon the points adjudged, and as to the provisions of the statute; but, in this age of progress, such anticipations are held to be amongst the wildest fallacies. It is now discovered that the principles asserted by the Admiralty Courts in England, or said to have been propounded by the mysterious, unedited and unproduced proceedings of the Colonial Vice-Admiralty Courts, so often avouched here in argument; the decisions of this court and

the provisions of the Act of 1845, are all to be thrown aside, as wholly erroneous. That the admiralty power is not to be restricted by its effect upon the territorial, political or municipal rights and institutions upon which it may be brought to bear, nor by any checks from the authority of the common law. That there is but one rule by which its extent is to be computed, and that is the rule which measures it by miles or leagues; that the scale for its admeasurement can be applied only as the discretion of the judiciary may determine, upon its necessity or policy, irrespective of the Constitution, the Statute, or the character of the element on which it is to be exerted, or the adjudications of this court on this last point. That the admiralty of the fixed and limited realm of England, and as known to the framers of the Constitution, cannot be the admiralty of this day; and, of course, the admiralty of our time and of our present day must be changed according to the judgment or discretion of the courts, in the event of further acquisitions of territory.

"Such are the conclusions regularly deducible from the opinion of this court in the case of The Genesee Chief—conclusions, in my deliberate judgment, the most startling and dangerous innovations anterior to that decision, ever attempted upon the powers and rights of internal government appertaining to the States."

He then makes the following interesting observation on the course of our constitutional law as developed by the courts:

"If the experience—says he—of a pretty long official life had not familiarized me with instances, unhappily not a few, in which the meaning and objects of the Constitution and the just influence of the actually surrounding condition of the country when that instrument was framed have been lost sight of or made to yield to some prevailing vogue of the times, I confess that some surprise would have been felt at the seeming forgetfulness of the court in giving utterance to the expressions above quoted, of the facts, that when the Constitution was adopted, there was no such navigation as that on the Mississippi then known—no such river was then possessed by the United States; that the Constitution was formed by, and for, a co-existing political and civil association; was designed to be adapted to that state of things; and was in itself complete, and fully adapted to the ends and subjects to which it was intended to be applied. And but for the reason or the examples above referred to, the greater surprise would have been awakened by the disregard manifested, in the reasoning of the court, to this great fundamental principle of republican government, that if the Constitution was, at the period of its adoption, or has since, by the mutations of time and events, become inadequate to accomplish the objects of its creation, it belongs exclusively to those who formed it, and in whom resides the right

to alter or abolish it, to remedy its defects. No such power can exist with those who are the creatures of the Constitution, clothed with the humbler office of executing the provisions of that instrument."

Turning again to the case at bar, he says:

"It is conceded by the court, that at the time of forming the Constitution the admiralty jurisprudence of England was the only system known and practiced in this country; it is admitted, also, that the English system was limited in theory and practice to the ebb and flow of the tide. It is further admitted, that at the time the Constitution was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here. These admissions form a virtual surrender of anything like a foundation on which the decision of the court could be rested, either in the case of The Genesee Chief, 12 How., 443, or in this case depending, on that alone. For, if it be admitted that at the time of the adoption of the Constitution the admiralty rule in England limited the jurisdiction to tidewaters, and that the same rule was adopted and was proper here, it follows, by inevitable induction, that the jurisdiction intended to be created by the Constitution was that which was the only one then known, and which, in the language of this court, was then proper here (as the Constitution cannot be supposed to establish anything unauthorized or improper), and necessarily was complete, and adapted to the existing state of things. . . .

"But the court, after having declared the correctness of the English rule and its adoption here, go on to say, nevertheless, 'that a definition which would at this day limit public rivers to tide-water rivers is wholly inadmissible.' And why? Because the Constitution, either by express language or by necessary implication, recognizes or looks to any change or enlargement in the principles or the extent of admiralty jurisdiction? Oh, no! For no such reason as this. 'But we have now (say the court) thousands of miles of public navigable water, including lakes and rivers, in which there is no tide.' Such is the argument of the court, and, correctly interpreted, it amounts to this: The Constitution, which at its adoption suited perfectly well the situation of the country, and which then was unquestionably of supreme authority, we now adjudge to have become unequal to the exigencies of the times; it must, therefore, be substituted by something more efficient; and as the people, and the States, and the Federal Legislature, are tardy or delinquent in making this substitution, the duty or the credit of this beneficent work must be devolved

upon the judiciary."

Mr. Justice Daniel then turns his attentions to the consequences of this decision, saying:

"Under this new regime, the hand of federal power may be thrust into everything, even into a vegetable or fruit basket; and there is no production of a farm, an orchard, or a garden, on the margin of these water courses, which is not liable to be arrested on its way to the next market town by the high admiralty power, with all its parade of appendages; and the simple, plain, homely countryman, who imagined he had some comprehension of his rights, and their remedies under the cognizance of a justice of the peace, or of a county court, is now, through the instrumentality of some apt fomenter of trouble, metamorphosed and magnified from a country attorney into a proctor, to be confounded and put to silence by a learned display from Roccus de Navibus, Emerigon, or Pardessus, from the Mare Clausum, or from the Trinity Masters, or the Apostles. . . .

"Few, comparatively, of the attributes of sovereignty and equality, presupposed to have existed in those by whom the Federal Government was created, have remained perfectly intact and exempt from aggression by their own creature; and by no conceivable agency could they be more fearfully assailed than by this indefinite and indefinable pretension to admiralty power, which, spurning the restraints prescribed to it by the wise caution of our own ancestors, challenges as occasion suits, the opinions and practices of all nations, peoples and tongues, however diverse or incon-

gruous with the genius of our own institutions.

"Not the least curious circumstance marking this course, is the assertion, that it produces equality amongst all the citizens of the United States. Equality it may be, but it is equality of subjection to an unknown and unlimited discretion, in lieu of allegiance to

defined and legitimate authority.

"In truth, the extravagance of these claims to an all controlling central power, their utter incongruity with any just proportion or equipoise of the different parts of our system, would exhibit them as positively ludicrous, were it not for the serious mischiefs to which, if tolerated, they must inevitably lead—mischiefs which should characterize those pretensions as fatal to the inherent and necessary powers of self-preservation and internal government in the States; as at war with the interests, the habits and feelings of the people, and therefore to be reprobated and wholly rejected. For myself, I can only say, that to whatsoever point they may, under approbation here or elsewhere, have culminated, they never can offer themselves for my acceptation, but they must encounter my solemn rebuke."

Mr. Justice Campbell, in a very elaborate opinion, reviews the history of the admiralty courts in England as well as in this country, and various important adjudications in both countries, all of which leads him to the conclusion that the claims put forward in this case on behalf of the Federal courts were untenable. In this connection he refers to the case of Genesee Chief v. Fitzhugh, in which he did not dissent, saying that although he did not believe that decision was right in principle, he did not protest against it, as he thought himself bound by the principle of stare decisis. But, believing that the present case was clearly beyond any principle theretofore adjudicated, he was bound to formally dissent. He then makes the usual reference to the dangerous consequences to follow from the contrary view, saying:

"If the principle of this decree is carried to its logical extent, all cases arising in the transportation of property or persons from the towns and landing places of the different States, to other towns and landing places, whether in or out of the State; all cases of tort or damage arising in the navigation of the internal waters, whether involving the security of persons or title to property, in either; all cases of supply to those engaged in the navigation, not to enumerate others, will be cognizable in the District Courts of the United States. If the dogma of judges in regard to the system of laws to be administered prevails, then this whole class of cases may be drawn ad aliud examen, and placed under the dominion of a foreign code whether they arise among citizens or others. The States are deprived of the power to mold their own laws in respect of persons and things within their limits, and which are appropriately subject to their sovereignty. The right of the people to self-government is thus abridged—abridged to the precise extent, that a judge appointed by another government may impose a law, not sanctioned by the representatives or agents of the people, upon the citizens of the State. Thus the contest here assumes the same significance as in Great Britain, and, in its last analysis, involves the question of the right of the people to determine their own laws and legal institutions. And surely this objection to the decree is independent of any consideration whether the river is subject to tides, or is navigable from the sea."2

² Judge Campbell's prediction, and more, has actually come to pass, as all the world now knows. The finishing touches to this particular extension of jurisdiction of the Federal courts was given by the Supreme Court of the United States, in 1866, when it decided the cases of *The Moses Taylor* (4 Wall. 411), and *The Hine v. Trevor* (4 Wall. 555). In those cases, the Supreme Court gave the Judiciary Act of 1789 a changed meaning—corresponding to the changed meaning which it gave to the Constitution in the decisions of the *Genesee Chief* and *Steamboat Magnolia* cases. On this last phase of the subject of admiralty jurisdiction, Mr. Warren says: "In 1866, the Court enhanced the National power by an important decision in

He then refers to the Act of Congress of 1845, claiming that the Act did not warrant the distinction now being made by the Court, but that, on the contrary, it was evidently intended to settle the practice contrary to the present decision, and he concludes his opinion as follows:

"There have been cases, since I came into this court, involving the jurisdiction of the court on the seas and their tide-waters, the lakes, and the Mississippi River. I have applied the law as settled in previous decisions, in deference to the principle of stare decisis, without opposing any objection—though in a portion of those decisions the reasons of the court did not satisfy my own judgment. I consider that the present case carries the jurisdiction to an incalculable extent beyond any other, and all others, that have heretofore been pronounced, and that it must create a revolution in the admiralty administration of the courts of the United States; that the change will produce heart burning and discontent, and involve collisions with State Legislatures and State jurisdictions. And, finally, it is a violation of the rights reserved in the Constitution of the United States to the States and the people."

As we have repeatedly suggested before, and as we shall have occasion to show in the further course of this work, the instances of judicial amendment of the Constitution are not at all infrequent. But this instance of the admiralty jurisdiction of the Federal courts is the only one we know of in which the judicial amendment of the Constitution is practically beyond dispute, if not indeed confessed. It thus conclusively proves the opinion repeatedly expressed by us that while theoretically the meaning of the Constitution is that which the Framers of that instrument put into it in 1787, practically, the meaning of the Constitution is that which the majority of the Supreme Court for the time being choose to give to it.

hitherto exercised jurisdiction." (Warren, The Supreme Court III, p. 137)

It is unnecessary to discuss here the question whether or not the decision in these last cases was correct. The mere mention of the dates 1789 and 1866, and the mere fact that at the latter date a rule was laid down contrary to that which prevailed—under the authority of the same Court—during the preceding three-quarters of

quarters of a century, tells its own tale.

The Moses Taylor and in The Hine v. Trevor, 4 Wall. 411, 555. In these cases, it was held for the first time that the grant of admiralty jurisdiction to the District Courts by the Judiciary Act of 1789 was exclusive, and that State laws conferring remedies in rem could only be enforced in these Courts. The result of the decision was to deprive the State Courts, especially in the West, of an immense class of cases relating to maritime contracts, collisions and other torts, over which they had hitherto exercised jurisdiction." (Warren, The Supreme Court III, p. 137)

CHAPTER XIX

ON THE EVE OF THE CRISIS

E have now reached the eve of the greatest crisis in our political and constitutional history—the Dred Scott decision, which ushered in the Civil War; the greatest crisis that our country has gone through since our existence as a nation. This crisis is peculiarly significant in connection with our subject, and it came at a peculiar moment, speaking purely in terms of time. The Constitution is now one hundred and forty years old. It was just seventy at the time the Dred Scott decision was rendered. It stands, therefore, not only exactly midway in the age of the nation under the Constitution, but it came at the end of what is considered the Biblical span of life for ordinary mortals. The condition of the Judicial Power at this point of our historical development is therefore of peculiar interest. It is of particular interest from our point of view, since, unlike most historians of our constitutional history, we believe that the Dred Scott decision formed a turning-point, breaking our constitutional history into two halves, of which the second half is as unlike the first as could possibly be imagined under the circumstances. What, then, was the situation of the Judicial Power on the eve of the great crisis?

We have already stated that the period between 1837 and 1857 was a period of confusion, and we have attempted to illustrate this confusion by some of the decisions rendered by the United States Supreme Court during that period—showing, we believe, a complete confusion of thought and a groping in the dark by the great jurists who composed that August Tribunal. But the period was not only a period of confusion, it was also a period of rebellion on the part of state courts against the United States Supreme Courtagraph a fact not noticed in our ordinary histories, and usually disposed of in a short or casual paragraph even by the special historians.

¹ This was written in the summer of 1927.

But it was a fact of the greatest moment, because it was merely a phase of the general repudiation of the Judicial Power even in the form in which John Marshall and his associates conceived it; and is, of course, utterly at variance with the Judicial Power as we know it today. Perhaps the best illustration of the complete repudiation of the Federalist notion of the Judicial Power—which is the Judicial Power that Marshall and his associates attempted to introduce into the Constitution—is the fact that in the argument of one of the great cases of the period we are now discussing, The Passenger Cases, Martin Van Buren, a former President of the United States and a leading constitutional lawyer in his daya man who could have been Chief Justice of the United States if he had been willing—in an argument before the United States Supreme Court seriously urged upon that Court the constitutional views embodied in the Virginia and Kentucky Resolutions. Volumes of detailed evidence could not tell more of the vast difference between the conception of the Judicial Power that was current then and that which prevails now, than the bare statement of the fact that such an argument was advanced by the man who advanced it in the forum in which it was advanced.2

But this point of view was not only urged by eminent constitutional lawyers in the argument of great cases before the United States Supreme Court. It was actually adopted as a rule of decision by great state courts—sometimes in such a manner as to produce an actual collision between the state courts and the United States Supreme Court. Our readers will recall that in the famous litigation involved in the case of Martin v. Hunter's Lessee, the Court of Appeals of the State of Virginia, adopting the principles of the Virginia and Kentucky Resolutions, had defied the United States Supreme Court—holding that the Supreme Court's assumption of power in that case was unconstitutional and therefore void. It is this attitude that various state courts now assumed, following in the footsteps of the Virginia Court of Appeals and carrying into judicial decisions the principles of the Virginia and Kentucky Resolutions which Martin Van Buren urged upon the Supreme Court of the United States in his argument in The Passenger Cases.

The reporter's abstract of Mr. Van Buren's argument in these cases says at one point: "In support of these positions he cited Senator Tazewell's speech against the Alien and Sedition Law. (4 Ell. Deb. 2d ed., 453; 3 Madison Papers, 1385.) Also, the Virginia and Kentucky resolutions and reports on the same subject. (4 Ell. Deb., 566 to 608 inclusive.)"

Among the courts that took this attitude on the eve of the great crises were the courts of the States of Ohio, Wisconsin, and California.

Before discussing in detail the attitude of these courts, it should be noted here that, while it is probably true that these courts were influenced in their attitude by the slavery question, it cannot be said that this attitude was due entirely to considerations connected with that question. The revolt of the Supreme Court of Wisconsin was, indeed, directly connected with the subject of slaverythat court declaring the Fugitive Slave law of 1850 unconstitutional in direct defiance of the principles laid down by the United States Supreme Court. But the actions of the other state courts were not concerned with Slavery, and the litigation involved in the Ohio decisions defying the United States Supreme Court concerned questions as remote from the subject of Slavery as anything could possibly be at that time-showing that the defiance by the state courts of the United States Supreme Court, and the attitude of the leading men of the time toward the Judicial Power generally, was not induced by any heated passions aroused by the slavery question, but rather by the general thought prevalent at the time on the constitutional structure of our government. Although it is probably true that the slavery question was one of the ingredients in or causes of that mode of thought. This was undoubtedly true of some of the statesmen of the northeast—Charles Sumner, for instance. It is probably a good guess to say that Charles Sumner would not have held the constitutional views that he actually held had it not been for the slavery question.

But whatever the cause, the fact is undoubted that at this time most of the leading statesmen, North as well as South, East as well as West, held views on the subject of the Judicial Power considerably at variance with those held by Marshall and his associates and utterly incompatible with the views of the Judicial Power prevalent today. Charles Sumner, the leading statesman of Massachusetts at that time, and one of its leading lawyers—a lawyer, too, reared in the Story school of law—in a memorable speech delivered in the United States Senate on August 26, 1852, solemnly subscribed to the constitutional principles with respect to the Judicial Power embodied in President Jackson's famous Veto Message of 1832. Jackson could hardly have hoped for a greater vindication of his views. We have already had occasion to suggest

that these particular passages in Jackson's famous message were probably written by Roger B. Taney. But they were uttered by President Jackson, and some people might be inclined to dismiss them as of no great importance from the purely legal point of view, whatever importance they might have from the point of view of history or Democratic dogma. But Charles Sumner is quite a different matter: His commanding position as a constitutional lawyer, no less than the type of statesmanship which he represented, as well as his New England nativity and affiliations, make his views on the subject a matter of the greatest concern to any constitutional lawyer or historian, no matter to what school of thought he might belong. We shall therefore reproduce Sumner's views on the subject as given in his great speech:

"The decisions of the Supreme Court—says Sumner—are entitled to great consideration, and will not be mentioned by me except with respect. Among the memories of my youth are happy days in which I sat at the feet of this tribunal, while Marshall presided, with Story by his side. The pressure now proceeds from the case of Prigg v. Pennsylvania, (16 Peters, 539), wherein the power of Congress over this matter is asserted. Without going into any minute criticism of this judgment, or considering the extent to which it is extra-judicial, and therefore of no binding force, all which has been already done at the bar in one State, and by an able court in another; but conceding to it a certain degree of weight as a rule to the judiciary on this particular point, still it does not touch the grave question arising from the denial of trial by jury. This judgment was pronounced by Mr. Justice Story. From the interesting biography of this great jurist, recently published by his son, we derive the distinct statement that the necessity of trial by jury was not before the court; so that, in the estimation of the judge himself, it was still an open question. Here are the words:

"'One prevailing opinion which has created great prejudice against this judgment is, that it denies the right of a person claimed as a fugitive from service or labor to a trial by jury. This mistake arises from supposing the case to involve the general question as to the constitutionality of the act of 1793. But in fact no such question was in the case; and the argument that the act of 1793 was unconstitutional, because it did not provide for a trial by jury according to the requisitions of the sixth article in the amendments to the Constitution, having been suggested to my father on his return from Washington, he replied that this question was not argued by counsel nor considered by the court, and that he should still consider it an open one.'

this is his reply:

"But whatever may be the influence of this judgment as a rule to the judiciary, it cannot arrest our duty as legislators. And here I adopt with entire assent the language of President Jackson, in his memorable veto, in 1832, of the Bank of the United States. To his course was opposed the authority of the Supreme Court, and

"'If the opinion of the Supreme Court covers the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive and the Court, must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution, swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President, to decide upon the constitutionality of any bill or resolution, which may be presented to them for passage or approval, as it is of the Supreme Judges when it may be brought before them for judicial decision. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive, when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.'

"With these authoritative words of Andrew Jackson, I dismiss this topic. The early legislation of Congress, and the decisions of the Supreme Court, cannot stand in our way. I advance to the

argument."

It has been said, and correctly said, that the office of judge is in itself a conservative influence, and has a tendency to make conservatives even of the most rabid radicals. Because of this there is a certain feeling that the utterances of great jurists who do not happen to be occupants of the bench are not entitled to the same weight as those of the wearers of the ermine. Charles Sumner's views of the Judicial Power, notwithstanding his extremely conservative training and affiliations, may not, therefore, have with some ultra-conservatives the same weight as they would have had had they been uttered by a judge. It is supposed to have been the theory of the Middle Ages in England that learned lawyers only have opinions on the law, while judges know the law. And there are still those to whom the utterances of an actual judge even of no particular importance are more important than those of a potential judge of great importance. We shall therefore proceed to quote from judges and cases, in order to show that the views expressed by Charles Sumner in the United State Senate, or substantially similar views, were not only held by people actually

exercising judicial functions, but were actually embodied in judicial opinions—some of them being made the basis and support of actual judgments.

The struggle between the Supreme Court of the State of Ohio and the United States Supreme Court involved the most important politico-economic problem of the day, outside of the Slavery question, namely, the question of the growing power of corporations. From a technical legal point of view, it involved the problem of the maintenance, extension, or curtailment of the doctrine of vested rights announced by Marshall and Story in the famous Dartmouth College Case, which, as we have seen, had been given a severe setback in the Charles River Bridge Case. The form in which the question now presented itself was, whether a bank, organized under a general law which provided for a certain mode of taxing banking corporations, had a vested right in this particular mode of taxation, so that the legislature was powerless thereafter to change the mode of taxation with reference to such banks.

It will be recalled that the basic principle announced in the Dartmouth College Case by John Marshall was that the charter of a corporation was a contract entered into between the state and the corporation chartered thereby, and that the state was therefore powerless to thereafter amend the charter against the wishes of the corporation. The charter involved in Woodward v. The Trustees of Dartmouth College was a special charter granted by the sovereign power to the incorporators of the corporation. The Ohio cases now under consideration involved no such special charters, the corporation in question having been organized under a general law which permitted any five or more persons to organize a bank under its provisions. The cases were therefore clearly distinguishable. And a holding that the charter of a corporation organized under a general law providing for a certain mode of taxation—the charter itself not providing for that particular mode of taxationwas likewise a contract between the state and the bank, and that that contract embodied as one of its terms this particular mode of taxation, was therefore clearly a step, and a long step, beyond the decision in the Dartmouth College Case. And the United States Supreme Court took the step, to the great consternation and amazement of the people at large as well as of the legal profession. This step was taken under the leadership of Justice McLean, who was then the foremost conservative on the United States Supreme Court Bench, and one of the two "most high-toned Federalists" on the bench, to use the language of so conservative a man as Associate Justice Curtis. It is a matter of no little import that Chief Justice Taney, who commenced his career on the bench as a great radical and was the author of the famous Charles River Bridge Case opinion, now adhered to the majority, although in a faltering way—having grown conservative with age and under the influence of Slavery.

There were two cases involving practically the same question before the United States Supreme Court. One was entitled The Piqua Branch of the State Bank of Ohio v. Knoop (16 Howard, 369), and the other was entitled The Ohio Life Insurance and Trust Company v. Debolt (16 Howard, 416). The first of these cases involved the question of bank taxation already referred to. The other involved the same law, but the matter was somewhat complicated by the fact that the Ohio Life Insurance and Trust Company had been organized under a different law, although it subsequently came under the operation of the banking law in question. The first case was decided by a vote of six to three. Justice McLean wrote the prevailing opinion, and Chief Justice Taney was of the majority. But the Chief Justice could not accept all of the principles enunciated in the opinion of his "high-toned Federalist" associate, and so he wrote a concurring memorandum, in which he stated that he did not "assent altogether to the principles or reasoning contained in the opinion just delivered" by Justice McLean, and referred those who were interested in knowing his own opinions to the Ohio Life Insurance and Trust Company Case. Associate Justices Catron, Daniel, and Campbell dissented. Justices Catron and Campbell wrote rather lengthy dissenting opinions, and Justice Daniel wrote a short memorandum expressing his concurrence with the views expressed in Justice Campbell's dissenting opinion, and added the additional ground that the Federal Courts have no jurisdiction over cases in which corporations are parties. It will be recalled that this constitutional doctrine was originally announced by Chief Justice Marshall, with the concurrence of the entire Supreme Court, in the case of The Bank v. Deveaux, decided in 1810, and that this was the law for some thirty-five years, until the Supreme Court reversed itself in the case of Louisville R.R. v. Letson, (12 How., 497). Justice Daniel never accepted this last decision of the

United States Supreme Court as law, and therefore urged it in the Ohio cases now under consideration as an additional ground for his dissent from the majority.

In the Ohio Life Insurance Case we are again presented with the spectacle of a decision without an opinion of the court as such, with which we have become familiar during this Period of Confusion. The official report in this case begins with the following announcement:

"There being no opinion of the court, as such, in this case, the reporter can only state the laws of Ohio which were drawn into question."

And Chief Justice Taney begins his opinion with the following statement:

"In this case the judgment of the Supreme Court of the State of Ohio is affirmed. But the majority of the court who give this judgment, do not altogether agree in the principles upon which it ought to be maintained. I proceed, therefore, to state my own opinion, in which I am authorized to say my brother Grier entirely concurs."

The judges making up the majority in the second case consisted of the three judges who composed the minority in the Piqua Branch Case, together with Chief Justice Taney and Associate Justice Grier, who now abandoned their colleagues of the majority of the Piqua Branch Case, to join those of the minority. The present minority consisted of Judges Wayne, Curtis, Nelson and McLean, who wrote the prevailing opinion in the Piqua Branch Case and now wrote the leading dissenting opinion. Justice Curtis wrote a short opinion on his own account, in which Justice Nelson concurred. Justice Wayne just noted his dissent, without writing an opinion, and without expressly concurring with either of the two opinions written on behalf of the present minority. It will thus be noticed that both the majority and the minority of the court were at loggerheads among themselves.

From the purely legal point of view, the division of opinion in the Ohio Life Insurance Company Case is perhaps of more interest than that in the Piqua Branch Case, but from the point of view of history, and of the particular subject here under consideration, the Piqua Branch Case is by far the more important. At any rate, it is around this case that the struggle between the Supreme Court of

the State of Ohio and the United States Supreme Court centred. We shall therefore state the question involved in that case in greater detail.

In 1845 the Legislature of Ohio passed a general banking law, one section of which required that the officers of any bank organized under its provisions should make semi-annual dividends, and another section required them to set off six per cent of such dividends for the use of the State, the sum or amount so set off to be in lieu of all taxes to which the bank or its stockholders would otherwise be subject on account of the bank's business or property. Many banks were organized under the provisions of this law, and it soon appeared that the system of bank-taxation thereby provided for really amounted to an exemption from taxation, as bank property was taxed thereunder far below its actual value. The law of 1845 was therefore generally objected to as a discrimination against other forms of property, which were being taxed at a much higher rate. In 1851, the Legislature of Ohio therefore passed a law entitled "An Act to tax banks, and bank and other stocks, the same as property is now taxed by the laws of this State." In this act the special mode of taxing banks and bank-stock provided for in the law of 1845 was abolished, and banks and bank-stock were taxed substantially like other property; which taxation, as already stated, was much more burdensome than the taxation provided for in the law of 1845. The banks naturally objected to the new system of taxation, and claimed that the law of 1845, under which they had been organized, was in effect incorporated into their charters, and that they therefore had a vested interest in the privileged mode of taxation for banks therein provided for. The Ohio State Supreme Court decided against the banks—holding that the law of 1845, being a general law, was repealable like any other general taxation law, and that the banks had no more vested right in that law than any citizen had in any particular tax law. The U.S. Supreme Court, as we have already seen, reversed this judgment, upholding the contention of the banks that the general law under which they were organized was part of their charters, and therefore gave them an irrepealable exemption from taxation. In his dissenting opinion Justice Catron of the United States Supreme Court said, referring to the decision of the Ohio Supreme Court:

"The first question made and decided in the Supreme Court of Ohio, was whether the 60th section of the Act of 1845, purported to be, in its terms, a contract not further to tax the banks organized under it during the entire term of their existence. The court held that it imported no such contract; and with this opinion I concur.

"The question was examined by the judge who delivered the unanimous opinion of the court, in the case of Debolt v. The Ohio Life Insurance and Trust Company, 1 Ohio, 564, with a fairness, ability and learning, calculated to command the respect of all those who have his opinion to review: and which opinion has, as I think, construed the 60th section truly. But, as my brother Campbell has rested his opinion on this section without going beyond it, and as I concur in his views, I will not further examine that question, but adopt his opinion in regard to it.

"The next question, decided by the State Court, is of most grave importance; I give it in the language of the State Court: 'Had the General Assembly power, under the constitution then in force, permanently to surrender, by contract, within the meaning and under the protection of the Constitution of the United States, the right of taxation over any portion of the property of individuals, otherwise subject to it?" On which proposition the court pro-

ceeds to remark:

"'Our observations and conclusions upon this question, must be taken with reference to the unquestionable facts, that the Act of 1851 was a bona fide attempt to raise revenue by an equal and uniform tax upon property, and contained no covert attack upon the franchises of these institutions. That the surrender did not relate to property granted by the State, so as to make it a part of the grant for which a consideration was paid; the State having granted nothing but the franchise, and the tax being upon nothing but the money of individuals invested in the stock; and that no bonus or gross sum was paid in hand for the surrender, so as to leave it open to controversy, that reasonable taxes, to accrue in future, were paid in advance of their becoming due. What effect a different state of facts might have, we do not stop to inquire. Indeed, if the attempt has here been made, it is a naked release of sovereign power without any consideration or attendant circumstance to give it strength or color; and, so far as we are advised, it is the first instance where the rights and interests of the public have been entirely overlooked.'

"Under these circumstances, we feel no hesitation in saying the General Assembly was incompetent to such a task. This conclusion is drawn from a consideration of the limited authority of that

body, and the nature of the power claimed to be abridged."

The interesting thing about Mr. Justice Catron's opinion, and the opinion of the Ohio Supreme Court which he quotes with ap-

proval, is that it is based upon the theory of the limited power of government which is supposed to lie at the very foundation of the Judicial Power. And it is interesting to note in this connection that all those who are so vehement in the assertion of the necessity of the Judicial Power in order to prevent legislatures from overstepping the bounds prescribed for them by the Constitution, and who are therefore always ready to acclaim a court decision declaring unconstitutional an act of the legislature because of such over-stepping of the limits prescribed by the Constitution, are equally vehement in asserting the theory of Vested Rights, and ever ready to exert themselves in behalf of these so-called vested rights, even where they are clearly based upon an act of the Legislature overstepping the limits prescribed by the Constitution.

Mr. Justice Catron proceeds to quote further from the opinion of the Ohio Supreme Court in his effort to prove the fallacy of the reasoning of his own associates, his quotations ending with the following passage, intended to expose the error of the assumption that the protection of so-called vested rights, in reality special privileges, is tantamount to the protection of property rights:

"For every surrender of the right to tax particular property not only tends to paralyze the government, but involves a direct invasion of the rights of property, of the balance of the community; since the deficiency thus created must be made up by larger contributions from them, to meet the public demand."

He then says on his own account:

"The foregoing are some of the reasonings of the state court on the consideration here involved. With these views I concur, and will add some of my own. The first is, 'That acts of Parliament derogatory from the power of subsequent Legislatures are not binding. Because (as Blackstone says), the Legislature being in truth the sovereign power, is always equal, always absolute; and it acknowledges no superior on earth, which the prior Legislature must have been if its ordinances could bind a subsequent Parliament. And upon the same principle Cicero, in his letters to Atticus, treats with proper contempt these restraining clauses which endeavor to tie up the hands of succeeding Legislatures. When you repeal the law itself, says he, you at the same time repeal the prohibitory clause which guards against repeal.'

"If this is so under the British government, how is it in Ohio? Her Supreme Court holds that the State constitution of 1802 ex-

pressly prohibited one Legislature from restraining its successors by the indirect means of contracts exempting certain property from taxation. The court says, Power to exempt property was reserved to the people; they alone could exempt, by an organic law. That is to say, by an amended constitution. The clause mainly relied on declares 'that all powers not delegated, remain with the people.' Now, it must be admitted that this clause has a meaning; and it must also be conceded (as I think) that the Supreme Court of Ohio has the uncontrollable right to declare what that meaning is; and that this court has just as little right to question that construction as the Supreme Court of Ohio has to question our construction of the Constitution of the United States.

"In my judgment the construction of the court of Ohio is proper; but if I believed otherwise I should at once acquiesce. Let us look at the matter fairly and truly as it is, and see what a different course on the part of this court would lead to; nay, what Ohio is bound to do in self-defense and for self-preservation, under

the circumstances."

What the State of Ohio did in "self-preservation" will be seen a little further below. Before turning to that, however, we must quote a passage from Justice Campbell's opinion; a passage which is highly interesting, not only in connection with the subject here under consideration, but also because it discloses the opinion held by a very able jurist of the respective merits of the opposing opinions of Chief Justice Taney and Mr. Justice Story in the famous Charles River Bridge Case, which was not only an important milestone on the way from Dartmouth College to Piqua Branch, but is still of the greatest importance in our jurisprudence. In speaking of Chief Justice Taney's opinion in the Charles River Bridge Case, Mr. Justice Campbell said:

"The court only declared those principles for which the commons of England had struggled for centuries, and which were only established by magnanimous and heroic efforts."

He then proceeds as follows:

"The rules that public grants convey nothing by implication, are construed strictly in favor of the sovereign, do not pass anything not described nor referred to, and when the thing granted is described, nothing else passes; that general words shall never be so construed as to deprive him of a greater amount of revenue than he intended to grant, were not the inventions of the craft of the crown lawyers, but were established in contests with crown favorites, and impressed upon the administration, executive and judicial as checks for the people. The invention of crown lawyers

was employed about such phrases, as ex speciali gratia, certa scientia mero motu, and non obstante, to undermine the strength of such rules, and to enervate the force of wholesome statutes. A writer of the seventeeth century says, 'from the time of William Rufus, our kings have thought they might alienate and dispose of the crown lands at will and pleasure; and in all ages, not only charters of liberty, but likewise letters patent for lands and manors, have actually passed in every reign. Nor would it have been convenient that the prince's hand should have been absolutely bound up by any law, or that what had once got into the crown should have been forever separated from private possession. For then by forfeitures and attaintures he must have become lord of the whole soil in a long course of time. The constitution, therefore, seems to have left him free in this matter; but upon this tacit trust (as he has all his other power), that he shall do nothing which may tend to the destruction of his subjects. However, though he be thus trusted, it is only as head of the Commonwealth; and the people of England have in no age been wanting to put in their claim that to which they conceived themselves to have a remaining interest; which claims are the acts of resumption that from time to time have been made in Parliament, when such gifts and grants were made as becomes burdensome and hurtful to the people. . . .

"Our constitution, therefore, seems to have been, that the king always might make grants, and that these grants, if passed according to the forms prescribed by the law, were valid and pleadable, against not only him, but his successors. However, it is likewise manifest that the legislative power has had an uncontested right to look into those grants, and to make them void

whenever they were thought exorbitant."

Probably taking the hint from Justice Catron's opinion as to what the State of Ohio "is bound to do in self-defense and for self-preservation under the circumstances," the Supreme Court of the State of Ohio refused to recognize the validity of the decision of the United States Supreme Court, taking the position that the famous twenty-fifth section of the Judiciary Act of 1789 was unconstitutional. In so doing, the Ohio Supreme Court, as we have seen, was only following the example set by the Court of Appeals of Virginia some forty years earlier in the famous contest over the decision of the United States Supreme Court in Martin v. Hunter's Lessee.

At about the same time the same position was taken by the Supreme Court of California, in a case known as Johnson v. Gordon, (4 Calif., 368), decided in 1854. The question came up in

the California Supreme Court on an appeal from a motion to transfer a case then pending in the California state courts to the United States District Court for the District of California. In passing upon this appeal the Supreme Court of California took occasion to express its opinion upon the entire subject; and its decision is thus summarized in the reporter's headnote:

"1. The Constitution of the United States gives no authority to the Supreme Court of the United States to exercise appellate jurisdiction over the State Courts, nor can such authority be derived by implication, or construction.

"2. The State Courts and the Federal Courts are co-ordinate tribunals, with concurrent jurisdiction in many cases, and the decision of the one in which jurisdiction first attaches, is final and

conclusive.

"3. No cause can be transferred from a State Court to any

Court of the United States.

"4. Neither a writ of error nor appeal lies to take a case from a State Court to the Supreme Court of the United States."

In delivering the opinion of the Court, Justice Heydenfeldt said in behalf of the unanimous court:

"The defendant upon the allegation that he is an alien, moved the Court below to transfer the case to the District Court of the United States, which the Court refused to do, and this refusal is assigned as error. This is the only assignment of error, which requires a serious consideration. With this question we will also consider the application made to this Court, in the case of Eldridge v. Cowell, for a writ of error to this Court from the Supreme Court of the United States, which was refused from the Bench.

"The question of power between the Federal and State Judiciary has been fully discussed on both sides, by some of the ablest

intellects which our country has produced.

"In approaching the subject, therefore, after much consultation, we think that little else is left for us to do, but to adopt the

opinions of the one side or the other.

"At an early period, Hamilton, in the Federalist, and afterwards Story and Johnson, in the case of Martin's Heirs v. Hunter's Lessee, have given us the argument in favor of the extent of power claimed for the Federal Judiciary. This was followed by the same reasoning in the former Judge's Commentaries on the Constitution.

"On the other side of the question we have in the case above stated, the exposition of the Supreme Court of Virginia, and argument of Mr. Calhoun, in his Discourse on the Constitution

and Government of the United States.

"We have read carefully on both sides, and convinced, as we are,

by the reasoning of the latter, we are forced to the adoption of his conclusions. We have considered the suggestion, that the power claimed has been acquiesced in by most, if not all, of the other States, and generally, without any attempt to question or resist it; but we see no sufficient reason in this fact for the surrender of a power which belongs to the sovereignty we represent, involving an assumption of power by another jurisdiction in derogation of that sovereignty. We think, too, that the acquiescence in this usurpation of the Federal Tribunal under an act of Congress, not warranted by the Constitution, is not so much owing to a conviction of its propriety, as it is to the high character of the Court, and the general correctness of its decisions."

The same attitude was taken by the Supreme Court of Wisconsin in the famous Booth Cases, growing directly out of the agitation over Slavery. But the Wisconsin court went a step further. Not only did it hold that it had the right to decide upon the constitutionality of such a law as the twenty-fifth section of the Federal Judiciary Act of 1789, which directly affected its own rights as a State court, by providing an appeal from its decisions to the United States Supreme Court, but that it had the general right of judging for itself of the constitutionality of general laws passed by the United States Congress. It then proceeded to declare the Fugitive Slave Act of 1850 unconstitutional. The circumstances of this famous case are so interesting, as showing the general attitude of the people at that time towards the United States Supreme Court, and as illustrating the mood then prevailing among both bench and bar, that the story is worth re-telling in some detail.

The hero of the story was Sherman M. Booth, originally of Connecticut and at this time of Milwaukee, who was the editor of an abolitionist paper and a leading local figure in the antislavery agitation. He was arrested several times in connection with the rescue of a Negro slave named Glover, who had escaped from his master in Missouri and had gone to live near Racine, Wisconsin, a few years prior to his apprehension by his master under the terms of the Fugitive Slave Law of 1850. The rescue seems to have been actually effected by a Committee appointed at a mass meeting held at the court house in Milwaukee, after speeches had been made by prominent members of the bar; but Booth was charged with being the instigator of the rescue. A warrant for his arrest was first issued by a United States Commis-

sioner, and resulted in his being freed on a writ of habeas corpus issued by the state courts. He was then indicted in the Federal courts and convicted, but was again released on a writ of habeas corpus issued by the state courts. In both of these cases the state courts, with the Supreme Court at their head, refused to abide by the decisions of the United States Supreme Court, and assumed the power to declare acts of Congress unconstitutional. And in the second case, the Wisconsin Supreme Court actually defied the mandate of the United States Supreme Court, and released on habeas corpus a prisoner held by the United States Marshal under a judgment of a conviction in a Federal court, because it, the State Supreme Court, was of the opinion that the Act of Congress upon which the conviction of the prisoner was based was unconstitutional, even though the United States Supreme Court had held it to be constitutional.

The curious thing about it all is that in so doing the Wisconsin Supreme Court was actually carrying to its logical conclusion the doctrine upon which the entire Judicial Power is based—at least, as that doctrine was understood and taught by its original exponents, James Wilson and John Marshall, and as it is still understood and taught by the more conservative of its adherents and supporters.

Before proceeding to discuss these opinions, it should be noted that the people who advanced them at the bar, and who sustained them on the bench, were among the best lawyers of their time. Some sixty years later, and after the Judicial Power had been firmly established on the new foundations laid down by Chief Justice Taney and his successors, Chief Justice John B. Winslow, of the Supreme Court of Wisconsin, in a book entitled The Story of a Great Court, speaks in the highest terms both of Booth's counsel, who advanced these arguments, and of the judges who rendered the decisions in question. The counsel who advanced the constitutional theories adopted by the court was Byron Paine, a noted lawyer, and subsequently himself a judge of the Wisconsin Supreme Court.

The case was no mere local cause célèbre; nor was the argument a mere local event. On the contrary, both the argument—which was published at the time in pamphlet form—and the decision of the court, were events that stirred the entire nation. The argument elicited many congratulations, among them one from

Charles Sumner, who wrote to Paine under date of August fifth, 1854:

"I congratulate you upon your magnificent effort, which does honor not only to your state but to your country; the argument will live in the history of this controversy. God grant that Wisconsin may not fail to protect her own right and the rights of her citizens in the emergency now before her. To her belongs the lead which Massachusetts should have taken." (Winslow, The Story of a Great Court, p. 77. See also S. S. Gregory, A Historic Judicial Controversy, Michigan Law Review, Jan., 1813.)

As to the points raised by this argument, Chief Justice Winslow, in the book just referred to, says:

"He (Paine) argued that the fugitive slave law was unconstitutional on three grounds: (1) because Congress had no power to legislate upon the subject at all, being the ground taken by Judge Smith in his opinion; (2) because it provided that a man might be reduced to a state of slavery without a trial by jury, and (3) because it vested judicial power in Court Commissioners contrary to the terms of the Constitution, which provided for the vesting of such power in certain Courts."

As we have already mentioned, Booth was originally arrested upon the order of a United States Commissioner, and it was on the argument of the habeas corpus on this arrest that the matter first came into prominence. It was of Paine's argument on this first habeas corpus that Chief Justice Winslow was speaking in the passage just quoted. The writ of habeas corpus was issued by Associate Justice Smith of the Supreme Court, and it is to Mr. Justice Smith's opinion in issuing this writ-which opinion he afterwards repeated when the case came up for hearing before the entire Supreme Court on an appeal by the Federal District Attorney from Mr. Justice Smith's decision discharging the prisonerthat Chief Justice Winslow is referring in the above passage. The last of the three grounds urged by Paine on the first argument became, of course, inapplicable when the second case came before the Wisconsin Supreme Court, on the second writ of habeas corpus, issued after Booth had been regularly indicted and convicted in the Federal courts. But the decision was the same in the second case as in the first.

As indicated by Chief Justice Winslow in the passage quoted above, the court was not unanimous in its opinion. The fact is,

that of the three judges who rendered the original decision, one, Associate Justice Crawford, was actually opposed to the decision in so far as the serious question of constitutional law was concerned. Only two of the judges, Chief Justice Whiton and Associate Justice Smith, concurred in the opinion declaring the Fugitive Slave Law of 1850 unconstitutional; and only Associate Justice Smith went to the extent of holding that Congress had no power to legislate on the subject at all.

The United States Attorney appealed from the first decision of the Wisconsin Supreme Court to the United States Supreme Court. In the meantime Booth was indicted and tried in the Federal District Court, where he was convicted of a violation of the Act of 1850. Whereupon he again sued out a writ of habeas corpus, and, as already stated, was again released by the Supreme Court of Wisconsin, on the ground that the Act of 1850, a violation of which was the crime for which Booth was convicted, was unconstitutional. Naturally, the United States Attorney again appealed to the United States Supreme Court. The United States Supreme Court reversed both State decisions. But the Supreme Court of Wisconsin defied the United States Supreme Court by directing its clerk to refuse to recognize the writ of error issued by the United States Supreme Court, by making a return thereon, or to enter the mandate of the United States Supreme Court in the State Court after the United States Supreme Court had reversed the state court's decisions.

In this attitude the State Supreme Court had the support of both houses of the State Legislature, which passed formal resolutions upholding the constitutional views of its own Supreme Court, and these resolutions were approved by the Governor of the State.

"So that," says Mr. S. S. Gregory, in the article referred to above, "all the departments of the state government were thoroughly committed to this attitude of hostility to and defiance of the Federal Government."

But not only all the departments of government were so committed. These views had the entire approval of the overwhelming majority of the people of the state from the very beginning, and throughout the entire time this struggle lasted.

But it must not be assumed that this attitude on the part of

the people was a mere outburst of passion, and that the Supreme Court was, in its turn, merely carried away on the waves of this passion. On the contrary, whatever may be said of the attitude of the people, there can be no question but that, as far as the State Supreme Court was concerned, its attitude was the result of constitutional views carefully considered and ably stated. In speaking of the arguments and opinions in this case, Mr. S. S. Gregory, writing nearly sixty years later, said: "So there were great arguments in this case. Great arguments make great opinions." And Chief Justice John B. Winslow, in his work referred to, writing about the same time as Mr. Gregory, said of Mr. Justice Smith's opinion, which was the most far-reaching:

"Mr. Justice Smith, in a long and able opinion, discharged the prisoner on the ground that Congress was given no power by the United States Constitution to legislate on the subject, but that the clause in the Constitution providing that fugitive slaves should be given up to the owner was simply a command to the State, and to be enforced by the states alone."

In this opinion, the ability of which is thus certified to by the Chief Justice of the Supreme Court of Wisconsin nearly sixty years later, Mr. Justice Smith said:

"This Court has no disposition to interfere with the criminal jurisdiction of the District Court of the United States. Unless that Court proceeds within the limits which the constitution and laws of Congress have prescribed, its acts are a nullity. Its jurisdiction is always open to question, and must affirmatively appear. If jurisdiction be wanting, its process, judgments and decrees are void. Were it otherwise, that Court might proceed to indict, convict and punish for common assault, libel, breaches of the peace, and so forth, imprison our citizens at its own will and pleasure, administer the whole common law code of offenses and punishments, from whose judgments there could be no appeal, and whose prison doors no earthy power could unlock. Such doctrine is monstrous. We have not yet reached the point of submission."

The question of the constitutionality of the Fugitive Slave Law of 1850 is, of course, of mere historical interest now. The question of the constitutionality of the twenty-fifth section of the Judiciary Act of 1789, and the corresponding section of the present United States Judicial Code, which is the basis of the right of appeal from state courts to the United States Supreme Court, is of course of ever-present importance, even though it may be only of academic

interest, in view of the actual practice of our courts. But the reasoning contained in the passage just quoted from Mr. Justice Smith's opinion cannot be brushed aside as merely academic. For that reasoning touches the very foundations of the Judicial Power. Its logic is unanswerable: at least so long as we adhere to the logic of James Wilson and John Marshall, which was the only logic upon which the theory of the Judicial Power rested from the time that James Wilson first promulgated the theory in his famous lectures on the law, until the time that Mr. Justice Smith wrote his celebrated opinion on the eve of the Great Crisis.

APPENDIX A

THE DOCTRINE OF JUDICIAL REVIEW IN ENGLISH JURISPRUDENCE

As this work is not intended for antiquarians, or special students of legal history, we could not, in the main text, enter upon a lengthy and technical discussion of the subject indicated in the heading to this Appendix. We were, therefore, compelled to limit ourselves to a few brief citations from Pollock, Maitland, and Holdsworth for proof of our assertion that this doctrine was unknown to English jurisprudence, and that the assertions to the contrary were due to a combination of two sets of misrepresentations: a misrepresentation by Coke as to the Common Law of England, followed by misrepresentations as to alleged decisions by Coke and his successors. We believe that the authorities quoted by us are so respectable, and their evidence so decisive, that we might very well let it go at that. But the importance of the subject, and the persistence of the error notwithstanding the statements of these authorities, as is evidenced by the repetition of these errors in the report of the learned Special Committee of the New York State Bar Association, make it worth while to go into this subject at some length, for the benefit of those of our readers who may be interested in such special studies.

Perhaps the best starting-point for this discussion is the statement of the Special Committee—although we shall, of necessity, have to touch upon matters not mentioned by that Committee, as we intend this to be an exhaustive review of every English case ever brought into this discussion, and of every English legal writer of note ever brought forward in support of the doctrine of judicial

review, insofar as they have come to our attention.

In its first report (1915) the Special Committee said:

"The American Revolution was a lawyers' revolution to enforce the principle laid down in Lord Coke's, Lord Hobart's and Lord Holt's decisions that acts of parliament against common right or in

violation of the natural liberties of Englishmen were void."

The committee then proceeded to cite Dr. Bonham's Case, Day v. Savadge, and City of London v. Wood, in proof of its assertion as to what the three Lords Chief Justices decided. And they also quoted Godden v. Hales as proof of the fact that the three great jurists mentioned were not alone in their position on the subject, but that the doctrine declared by them in the cases decided by them had, in the language of the Chief Justice who delivered the

opinion in Godden v. Hales, "always been taken for law." The Special Committee then says:

"The views of Coke, his associate Justices and their patriotic successors prior to the American Revolution that Parliament was not omnipotent and that it was the duty of all courts to refuse to execute acts of Parliament in contravention of the natural rights and liberties of free Britons, were adopted not merely by patriotic leaders like John Adams, Samuel Adams and James Otis, but by colonial legislatures, colonial and town conventions, and innumerable colonial town meetings during a long series of years prior to 1776."

The American side of the question has been treated at considerable length in the main body of this work, and some special phases will be discussed further in the succeeding appendices. They need not, therefore, detain us here. But before embarking upon an examination of the English "decisions," it may not be amiss to pay some attention to Lord Chief Justice Coke—for upon closer examination it will be found that Hobart and Holt play a very subordinate rôle in this matter. At most they were merely following in his footsteps. It was Coke who laid down the law, and the others were merely echoing his words. Who, then, was Coke, that a great revolution should be made—dividing the English-speaking people of the New World from those of the Old—in order to per-

petuate his views on the American continent?

Notwithstanding Coke's reputation as a lawyer, neither his character nor his standing as a thinker on questions of government entitle him to any such honor as is accorded him by the learned Committee's theory of the American Revolution. Like his more famous contemporary and rival, Lord Bacon, Coke had a checkered career and a considerably spotted reputation. And while he did not, like his great rival, plead guilty to bribery, he did not, on the other hand, have the transcendent genius of that rival as a thinker; and his reputation as a statesman is based on a comparatively brief parliamentary career towards the end of his long life, when he took a prominent part in the struggle of the Commons against the King. For the rest, he was a dry-as-dust common lawyer, whose title to fame was based on a reputation for great erudition in common law precedents, which has since been found to have been greatly overrated. The opinions of such a man on the question of the fundamental principles of government, and the case in which he is supposed to have expounded them, would, therefore, be of comparatively little value at this time, but for the learned Special Committee's report, and the new theory of the American Revolution therein advanced. But this report makes Coke, as well as Dr. Bonham's Case, of transcendent interest to all students of our institutions. Let us, therefore, look at them a little more closely.

Without going into a detailed study of Coke's character, it is safe to say that all historians agree on his two chief characteristics: an over-mastering ambition, and a complete absence of scruples as to the means employed to achieve any object, whether good or bad, on the achievement of which he had set his heart. With an equal lack of scruples he would sacrifice the happiness of his daughter in order to further his career at court, and invent "common law" or "precedents" in order to win a legal battle or be able to make a desired decision.

His public career may be divided into three periods. During the first period, comprising about one half of his entire public career, he was merely the servile courtier and unscrupulous tool of autocracy. Particularly during the latter part of this period, when he was Attorney-General, first under Elizabeth and then under James I, he earned a very unenviable reputation for meanness of spirit towards those whom he prosecuted on behalf of his royal masters. But this sinks into insignificance when compared with the fact that he used his position of Attorney-General and his great reputation as a common law lawyer to curtail the liberties of the people, by initiating a series of prosecutions for criminal libel before the infamous court of Star Chamber, and then used the decisions there obtained as a basis for the development of an alleged "common law" doctrine of criminal libel. In this connection the famous Case De Libellis Famosis deserves particular attention. In order that the reader may fully understand the position of that case in the development of the law of the subject, and Coke's part in destroying a substantial part of the liberty of the English people, we must notice the history of the law of libel before Coke put his hand to it.

In 1275 Parliament passed a statute making it a criminal offense to spread defamatory rumours concerning the great of the earth, commonly known as the statute of Scandalum Magnatum; and this statute was re-enacted several times in the course of the next century. But we have it on the authority of Professor Holdsworth that these statutes were but seldom made the basis of prosecutions. And, what is more important, unless the case fell within the express provisions of these statutes the common law courts refused to give any action for defamation. Indeed, such was the feeling of the people on the subject, that shortly after the first statute of Scandalum Magnatum was passed Parliament specifically declared that no action lay at common law for defamatory words. (W. S. Holdsworth, History of English Law, vol. 2, p. 366; Ib., vol. 3, pp. 409-10)

But this changed under the autocratic régime of the late Tudors

and the Stuarts, with the help of judges like Coke.

"The modern law of defamation—says Professor Holdsworth—

like the modern law of conspiracy, has originated in two sets of doctrines originating in the common law courts and in the Star Chamber respectively. . . .

"It was during this period (i.e., late 16th and early 17th centuries) that the common law definitely assumed jurisdiction over defamation by allowing a person who had been thus damaged to

bring an action on the case. . . .

"Throughout this period the popularity of the common law remedy was growing. Coke complained of the frequency of these actions; and we shall see that at the close of this period a small book was devoted to summarizing the results of the cases. . . .

"The common law conceived of defamation simply as a civil wrong causing damage to the person defamed. Damage was the gist of the action three consequences followed. In the first place publication to some third person was essential, because otherwise no damage could have ensued; and truth was a defense, because a person ought not to be allowed to receive compensation for damages caused to a character which he did not possess. In the second place, being a personal action for a tort, it died with the person. In the third place, the common law courts did not at this period recognize any difference between spoken and written defamation." (Holdsworth, op. cit. vol. 5, pp. 205-7)

Such was the common law as Coke found it. And now as to what he did with it. Of Coke's part in changing the law of defamation, Lord (Chancellor) Birkenhead says:

"As Attorney-General he was responsible for initiating a series of prosecutions for libel—nearly, but not quite, an innovation. His views of the law of defamation were very decided, but have not been followed by later judges. He thought that public criticism of public officials and private individuals, living or dead, was to be repressed, whether the criticism was true or false. (Case de libellis famosis, 5 Rep. 125 b) This is curious in view of the fact that he seems to have shared the repugnance of the judges for civil actions for slander." (Birkenhead, Fourteen English Judges, 29-30)

This brief paragraph, when taken in connection with the statement of the law as given by Holdsworth, tells a devastating tale. The "not quite" probably refers to the couple of prosecutions under the statutes of Scandalum Magnatum which have nothing to do with the case, as Coke's prosecutions were not under those statutes. Nor is "curious" the exact word to use in connection with the difference in Coke's attitude between criminal and civil prosecutions for defamation. "Damning" might be a more appropriate word. For a civil remedy is usually sought by a private citizen for actual damages sustained, while criminal prosecutions of this character have always been an engine of oppression in the hands of arbitrary

governments. The true meaning of Coke's position, and the full enormity of his doctrine as well as of his offense, can best be seen from an examination of his so-called "report" of the Case de Libellis Famosis, which is in reality nothing but a statement of his views which he succeeded in having adopted by the court of Star Chamber.

This report shows that Coke was the originator of that monstrous doctrine "the greater the truth the greater the libel," which long disgraced our law of this subject. But even the enormity of that doctrine pales before the enormity of Coke's offense in palming that doctrine off as a doctrine of the common law, which he did by means of this very "report." It should be borne in mind in this connection that the acceptance of this monstrous doctrine by the court of Star Chamber would of itself probably have had little effect on the common law courts. It was the misuse by Coke of his reputation for learnedness in the common law, by his assurances in his report that the law applied in that case by the court of Star Chamber was good common law doctrine, that caused the acceptance of this monstrosity into the common law of England, where it remained for generations—a scandal and a reproach to a people

that prided itself on its love of liberty.

The second, or middle, period of Coke's public career, consists of the ten years during which he was, successively, Chief Justice of the Common Pleas, and Chief Justice of the Court of King's Bench, 1606-1616. James the First was King, and Robert Cecil, Earl of Salisbury, was the all-powerful Prime Minister. This is important to remember, for Coke was a relative and a protegé of the great Prime Minister. But during the latter part of this period, at least, Coke had evidently decided that he was a great man on his own account—in fact, great enough to play an independent hand. Whether he was really ambitious enough to dream of an independent judicial kingdom of his own, which would stand between King and Parliament in the struggle then just beginning, claiming not only independence but even superiority to both, as is supposed by some historians, cannot be determined now. That he was ready to fish in troubled waters is quite clear. For our own part, we are inclined to think that his ambition, great as it was, did not aim beyond that of an independent position among the warring factions of the court. But here he undoubtedly considered himself a great power—strong enough to assert his independence, and perhaps not averse to showing the court that his position as judge gave him standing with the people and an opportunity to play for popular support.

Much has been made by Coke's admirers of his alleged independence as a judge in acting in opposition to his royal master. But we find very little proof of that. All of his so-called "defiance" of court influence is easily explainable by the struggle between the

various court factions, and particularly by his well-known rivalry with Francis Bacon and enmity for the Chancellor, Lord Ellesmere. Equally apocryphal seems to be his alleged martyrdom for his "defiance" of the Court in the interest of justice. His transfer from the Chief Justiceship of the Common Pleas to that of the King's Bench, supposed to have been a punishment for his "refusal to prostitute justice," was a promotion not only in name but in fact. To an ambitious man—and his ambition is the most authenticated trait of his character—the smaller revenue must have meant very little, bearing in mind that he was a very wealthy man, compared with the great dignity of the new office, which permitted him to describe himself as "Chief Justice of England," even if his opponents did claim that he had no right to the title.

But soon his ambition, whatever its aim, got him into difficulties. For he was not satisfied with being "Chief Justice of England" in name only. And so he set out to aggrandize his court at the expense of all the others. Soon he was on fighting terms with practically every other court in the land, including the powerful Court of Chancery, presided over by the King's Lord High Chan-

cellor.

In 1616 his opponents accused him of having published "extravagant" opinions in his "Reports." He was directed by the King to take a "vacation" and go over his Reports, with a view to correcting any errors which he might discover in them. While this matter was pending he was suddenly removed from the Chief Justiceship. The cause of his removal is buried in obscurity. One thing is certain, however,—in his dismissal, as in his promotion, he was not a martyr to any great "cause." According to his principal biographer, the true cause of his dismissal was a quarrel over the filling of the office of Chief Clerk of his court—a highly lucrative position desired by the King's new favorite, Lord Buckingham. According to Lord (Chancellor) Birkenhead, it was the result of his fight with the Court of Chancery plus a slight, or fancied slight, to the King's prerogative. Lord Birkenhead thus describes Coke's removal from office:

"The next move was Coke's. He procured the preferment of two indictments against persons who had brought suits in Chancery after actions had been decided in the Common Law Courts. There were on the Statute Books certain Acts, known as the Statutes of Praemunire, aimed at the Papal Courts and imposing penalties on those who interfered with the King's courts. The grand jury ignored the bills. Bacon, as Law Officer, advised that the Court of King's Bench could not interfere with the Court of Chancery. Before the dispute was settled a fresh dispute arose. Counsel in a case before the Exchequer Chamber had, during argument, denied the existence of a particular prerogative. The Court was

ordered at once to abandon the case, but, led by Coke, declined to do so. The result was that the Chief Justice was dismissed,—a false move, for he placed without delay his vast learning at the disposal of the opposition to the King in the Commons." (Birkenhead, Fourteen English Judges, p. 8)

The truth probably is that there were many contributing causes to Coke's downfall as a court favorite. The immediate occasion may have been the Chief Clerkship, the Statute of Praemunire, or some other matter. The underlying cause was his general pride and ambitious grasp for power. As was said by his contemporaries, his downfall was due to four "P"s—Pride, Prohibition, Praemunire, and Prerogative. But Pride was not only the first but the basic cause. This is borne out by a statement of King James himself, made in connection with the charges against the Reports. In this document King James says:

"That for things past, his Majesty had noted in him (Coke) a perpetual turbulent carriage, first towards the liberties of the Church and estate ecclesiastical, towards his prerogative royal and the branches thereof, and likewise towards all the settled jurisdictions of all his other courts, the High Commission, the Star Chamber, the Chancery, the Provincial Councils, the Admiralty, the Duchy, the Court of Requests, the Commission of Inquiry, the new boroughs in Ireland." (C. W. Johnson, Life of Sir Edward Coke, vol. 1, p. 315)

This brings us to the charges about his Reports, which brings up the question of Coke's "constitutional" opinions during this period: and it also brings us directly to Dr. Bonham's Case, which was made one of the specifications in the formal charges against

Coke growing out of the publication of his formal Reports.

Coke's Reports were published in thirteen parts, eleven of which appeared during his lifetime, and two posthumously. Of those that appeared during his lifetime, the first appeared in 1600 and the last in 1615. It should be noted that these Reports are not really reports in our sense of the word. They were rather "commentaries" upon the laws, the reported cases being made the occasion for Coke's opinions upon the subjects adjudicated. If Coke had only been careful to clearly separate the decisions from his own opinions, there could, of course, be no objection to this. Unfortunately, that is not the case, and the reader hardly knows what is report proper and what is merely Coke's own discourse. And the reporting itself is very far from being above suspicion. So we are told by Lord (Chancellor) Birkenhead, that at least in one case Coke's "report" is the exact reverse from the actual decision. Also—as we have seen in the Case de Libellis Famosis, and as we shall have occasion to see in our discussion of Dr. Bonham's Case—his assertions as to the common law and his references to earlier precedents

leave very much to be desired, to say the least.

Another thing to be noted about these Reports is the marked difference in the opinions expressed in the earlier and the later volumes. The difference between the volumes that appeared during Coke's lifetime and those which appeared posthumously has been noted by legal historians. It is supposed that the last two volumes were deliberately left unpublished by him because they contain matter which Coke did not dare publish during his lifetime. But while the eleven volumes published by Coke himself do not contain anything which even James I could consider seditious, there is, nevertheless, a marked difference between those volumes which were published during his Attorney-Generalship and his Chief Justiceship of the Common Pleas and those published while he was Chief Justice of the King's Bench, and particularly the last volume. It is interesting to note in this connection that all of the five cases which were cited to the King by Coke's opponents as containing "extravagant" opinions appear in the later volumesthree of them in the very last.

The charges were prepared by Francis Bacon, afterwards Lord High Chancellor, and approved by the then Lord High Chancellor, Lord Ellesmere. The gravamen of the charges was that Coke went out of his way to state opinions which were both "extravagant" and not involved in the decisions of the cases. As King James put it: "being all such as were expiations of his own, and no judgments."

The five cases involved, in the order given in the charges are: (1) Case of Isle of Ely, (10 Coke); (2) Darcy's Case, (11 Coke); (3) Godfrey's Case, (11 Coke); (4) Bonham's Case (8 Coke); (5)

Bagge's Case, (11 Coke).

The first of these cases, reported at the end of Vol. 10, had to do with the question of the powers the Sewer Commissioners had under the common law and under certain statutes. It is rather difficult now to determine the importance of the case. It is quite probable that it had no particular significance, and that Coke's opponents cited this case and the Bonham Case in order to show that Coke was interfering with other departments of government than those in which his opponents were directly concerned. Coke was to be pictured as a man of restless character and vaulting ambition, who was ready to set his court above all other departments of government: Parliament, Sewer Commissioners, the other courts of the realm,-all were to be made subservient to his power of Chief Justice of the King's Bench Court. At this juncture it would be no bad tactics to show that this was not either a personal squabble between courtiers nor merely a fight for the royal prerogative, but that all departments of government, as well as Parliament itself, were interested in nipping in the bud the assertions of such dangerous powers by the spurious "Chief Justice of England." Hence the cases of the Isle of Ely and Dr. Bonham. But the real interest of those behind the charges was in the other three cases.

Godfrey's Case involved directly Coke's attitude towards the other courts. He was asked what he meant by saying in the report of this case that "some courts cannot imprison, fine and amerce, as

ecclesiastical courts," etc.

Darcy's Case, also known to fame as the Case of Monopolies, involved the question of the royal prerogative. The history of this case is interesting, and its inclusion by Coke in his Reports at this time significant. And so was the manner of its reporting. This significance could not escape his astute adversaries, and was undoubtedly interpreted by them as a bid for popular favor. That undoubtedly was the meaning that they endeavored to have King James read into it. For all we know this interpretation was prob-

ably correct.

The case involved a monopoly granted by Queen Elizabeth for the importation and manufacture of playing cards. Darcy, the holder of the grant, sued Allein, a London haberdasher, to recover damages, because Allein had imported and sold playing cards in opposition to the monoply. The defense was that the monoply was in violation of a statute passed in the reign of King Edward IV, on the petition of London artizans, forbidding the importation of foreign playing cards. The case was pending in the courts for a long time, and was finally disposed of in 1603, during the lifetime of Queen Elizabeth, but after she had made a public declaration against monopolies and had promised to reform the abuses which had grown up under her grants. At the last hearing, Sir Edward Coke, then Attorney-General, appeared as counsel for the plaintiff, arguing in support of the monopoly. But the court was evidently more impressed by the Queen's declaration of policy, or perhaps by the popular clamor against monopolies, or a combination of both, than by the great lawyer's learned argument, and the judgment went against the plaintiff.

As already stated, this happened in 1603. But Coke, who had been publishing reports of important cases since 1600, ignored this case at the time, and for many years afterward. But now, in 1615, he suddenly recalled this case and inserted it among a lot of recent cases. But he not only reported it now, but reported it with a vengeance. He forgot completely what he had said in support of the monopoly in 1603, and made this the occasion of a long dissertation, or rather harangue, in favor of "common right," etc., clearly showing that he was trying to make political capital. But not craving for the crown of a martyr, he very carefully ends his report of a case disposed of in 1603 by a reference to a work against

monopolies published by King James himself in 1610.

Bagge's Case, which is the last case in the eleventh volume of

his Reports, and therefore the last case "reported" by him in his lifetime, involved the power of the governing body of a municipal corporation to remove from office one of their number for disrespectful conduct towards them, and particularly their head, the Mayor. It is a curious case and is reported by Coke at great length. The decision, approved by Coke, was that although Mr. Bagge's behaviour was very reprehensible and worthy of punishment, he could not, under the powers granted to the City of Plymouth, the municipality in question, by its charter, be removed by his associates from his office of magistrate. All of which was quite unimportant from the point of view of higher policy or politics involved in the charges against Coke. But Coke made this case the occasion for the assertion of some of his extravagant claims to power, by making such claims on behalf of the Court of King's Bench of which he was Chief Justice. In reporting this case, Coke said that "in this case it was resolved" that,

"To the Court of King's Bench belongs authority not only to correct errors in judicial proceedings, but other errors and misdemeanors extra-judicial, tending to the breach of the peace, oppression of subjects, or to raising of faction, controversies, debate, or to any manner of misgovernment, so no wrong or injury can be done, but that this shall be reformed or punished by due course of law."

He was therefore asked, in the charges, "to explain himself" what he meant by that. In his "Observations" on the subject, Lord (Chancellor) Ellesmere hit the nail on the head, both as a criticism of Coke's "report" and as showing up the "extravagance" of his claims, when he said:

"The point in question only was, what cause was sufficient for a corporation to remove a burgess from his place; he digressed from his matter and saith, it was resolved, that to the Court of K. B. belongeth authority. . . . Herein (giving excess authority to K. B.) he hath as much as insinuated that this court is all-sufficient in itself to manage the state; for if the King's Bench may reform any manner of misgovernment (as the words are) it seemeth that there is little or no use either of the King's royal case and authority exercised in his person, and by his proclamations, ordinances, and immediate directions, nor of the Council-table, which under the King is the chief watch-tower for all points of government."

Whether in making these extravagant claims for his court, Coke was developing a deep design conceived at the time of the decision in Bonham's Case, as suggested by Professor Plucknett, or was merely hitting back at his enemies, the same as in his attempts to use the Praemunire statute to prevent the Court of Chancery from correcting abuses in his court by granting relief in equity to persons defeated in courts of law, need not be inquired into here. One thing

is certain—he was certainly making very extravagant claims on behalf of his court, which neither his contemporaries nor posterity sanctioned. As we have seen, Bagge's Case was the last one reported by Coke during his lifetime, and the charges, in which it formed the last specification, if not the cause for his actual removal from office, were the occasion of the termination of his judicial career, as the suspension which followed them was itself followed by his removal without his ever resuming the discharge of duties as a judge.

His removal from the office of Chief Justice was followed after an interval of some years by a distinguished, although not brilliant, parliamentary career which lasted from 1620 to 1628. And the "Reports" were followed by "Institutes." And while there may be difference of opinion as to the relative merits of Coke's Reports and his Institutes, there can be no question as between his career as a judge and that as a parliamentarian. Whatever fame he has as a public man is based entirely on his activities as a member of Parliament, and his share in the framing of the famous Petition

of Right.

We need not examine further into the question as to whether his removal from office caused Coke to put his talents at the disposal of the parliamentary opposition, as suggested by Lord Birkenhead; or his removal from office was due to his growing leanings towards the popular side of the struggle between King and Parliament, as his admirers would have us believe. Of more interest to us is a point which seems to have been entirely overlooked by historians of the subject, the change which his whole-hearted acceptance of the people's side wrought in Coke's views of the relative importance of courts and legislatures. If Bonham's Case really is what it is "cracked up" to be—that is, if Coke really intended therein to lay down a general constitutional theory—then the change is nothing less than revolutionary. In fact, few revolutions either in thought or in government could be compared to its "revolutionary" quality. According to the supporters of the Judicial Power, Coke laid the foundations of that Power in Dr. Bonham's Case, expounding the theory of the Judicial Power in opposition to Parliamentary or Legislative Supremacy. And according to the learned Special Committee of the New York State Bar Association, the American Revolution became necessary in order to prevent Parliamentary Supremacy from perpetuating itself in this country, as it did in England. But in the fourth part of his Institutes, which, like parts twelve and thirteen of his Reports, was published after his death, Coke specifically declares for Parliamentary Supremacy. Says he:

"Of the power and jurisdiction of the parliament, for making of laws in proceeding by bill, it is so transcendent and absolute, as

it cannot be confined either for cases or persons within any bounds." (4 Coke's Institutes, 36)

The point we desire to make is not so much that, if Coke actually meant to announce in Dr. Bonham's Case the so-called "Coke theory" of constitutional government, he must have completely reversed himself in later years, as to call attention to the circumstances under which this reversal took place, and the moral which it points. For the Coke of the Institutes is as far removed from the Coke of the Reports as he is from Mr. Attorney-General Coke who argued for the plaintiffs in the Case of Monopolies and the Case de Libellis Famosis. It was during his parliamentary career, which culminated in the Petition of Right, that Coke developed his famous conception of Magna Charta which has become historic, dominating the historic thought of nearly three centuries, even though it was itself but poor history. And it was his exposition of Magna Charta and similar statutes, comprising particularly the later portions thereof, that made his Institutes famous. It was in Parliament that Coke made his famous announcement that "Magna Charta is such a fellow that he knows no sovereign." And this announcement meant what it was intended for at the time, the "sovereign" King and not the sovereign people. Whatever Coke's deficiencies as a historian may have been, he knew enough of history to know that Magna Charta was directed only against the King, and he was by this time enough of a patriot to know that any limitation upon the power of the people can only result in ultimate harm to the people. Hence his emphatic declaration of Parliamentary Sovereignty in his Institutes, which were the culmination of his career as a writer on law as his activities as a member of Parliament were of his career as a public man.

If Coke's career as a public man and writer on public law means

anything, it is this:

During the first half of his career, Coke was a mean and ambitious courtier, a willing tool of autocracy, looking for nothing but place and preferment. During this period he argued and wrote, with little scruple about truth, so as to curtail the rights of the people, prostituting his great erudition in common law lore in the service of autocracy. During his second or middle period, his ambition went beyond that of being a favored servant of a royal master. Taking advantage of the quarrel between King and Parliament, he attempted to play an independent hand and establish an independent position. During this period he used the same erudition, and his reputation for erudition, with as little scruple and as little right, for the aggrandizement of the courts, and particularly his own court, at the expense of both people and King. During his last period, finally, he ranged himself squarely on the side of the people and freedom as against the King and autocracy.

During this period he spoke and wrote in favor of the people's rights, including their absolute and unlimited right to make all laws which they may think best for their own government, unhampered either by King, tradition, or so-called fundamental principles of rights, which in the last resort can mean only one thing: the exaltation of somebody else's power over that of the people, and the imposition of somebody else's will upon the people.

But how about the famous Dr. Bonham's Case? May it not still be an authority, even though Coke repudiated its supposed

principles in later years?

Before proceeding to discuss this case "on the merits" it must be noted that its great reputation seems to be entirely of American manufacture. In the country of its origin, for whose government it is supposed to have been intended to provide the rule, it seems to be hardly known, or at least hardly considered of any importance. So much so, that of the two extended biographies of Coke, one does not mention it at all. And the other, the two-volume biography by Cuthbert W. Johnson, only mentions it incidentally, as one of the five cases referred to in the charges against the Reports. Not a word about the case as such; showing clearly that Coke's principal biographer, like Coke's other biographers, did not consider it of any importance whatever. Nor is the case mentioned in the sketch of Coke's career given in the Encyclopedia Britannica. Nor even in the sketch of Coke contained in Lord (Chancellor) Birkenhead's Fourteen English Judges. The latter fact is particularly interesting, not only because Lord Birkenhead is himself a distinguished lawyer and statesman, who occupied the highest judicial office in England, but because Lord Birkenhead does comment upon the famous cases decided by Coke. But from the list of these cases Dr. Bonham's Case is strangely, or, rather, significantly, absent.

The explanation of the absence of any reference or important comment upon this case in the Coke biographies or biographical sketches of Coke's career is to be found in the undoubted fact that in England at least the point which in this country has been paraded as a point of decision has always been regarded as what Coke himself as well as his enemies claimed it to be about the time

it was made, namely, mere "general words."

In giving his decision in the case Coke did not assume to give his own views, but merely to state the "common law."

"And it appears in our books—says he—that in many cases the common law will control acts of Parliament and sometimes adjudge them to be utterly void: for when an act of Parliament is against common right or reason, or repugnant or impossible to be per-

formed, the common law will control it and adjudge such act to be void."

The important question, therefore, is: Does it "appear by our books"? And to this the answer must be an emphatic negative.

Professor Plucknett, who feels rather kindly disposed to Coke for his alleged services in helping to establish the American Doctrine, says in a very able essay which appeared in the *Harvard Law Review* for November, 1926:

"Coke was prepared to advance mediaeval precedent for his theory, and in so doing has drawn upon his head the criticisms of later investigators. Just as these criticisms are from the point of view of modern scholarship, it is only fair to the Chief Justice to insist that his view of history was not ours, and that it is only by the standard of his own day that a true evalution of his learning and intellectual honesty can be formed. Although it must be confessed that even then he cannot be found altogether faultless, yet it is believed that a sufficient explanation will be found to establish his bona fides."

In an earlier work, in which he was not concerned with Coke's relationship to the American Doctrine, Professor Plucknett is not so sure of Coke's "bona fides." Quite the contrary. However, it is not Coke's moral character we are interested in at this point, but his character as a historian, that is, the value of the "mediaeval precedents," and their application to Dr. Bonham's Case. And those will, upon careful analysis, be found to be exactly nil.

In support of his contention that "it appears in our books," Coke cites five cases: Tregor's Case, (Year Book, 8 Edw. III., 26); the case in Fitzherbert's Abridgement known as Cessavit 42; a case in Fitzherbert's Abridgement known as Rous v. an Abbot; and two cases decided in Queen Elizabeth's time relating to a statute passed in the first year of the reign of Edward VI.

Let us, therefore, examine these cases and see how far they bear out Coke's contention that they annul acts of Parliament and adjudge them to be utterly void.

As to the first case Coke himself says that Judge Herle, who decided that case,

"saith some statutes are made against law and right which those who made them perceiving, would not put them into execution."

And Coxe reports the case in the same way, quoting from the Year Book, 8 Edw. III., 30. It will be noted that there is no deci-

In his Statutes and their Interpretation in the Fourteenth Century, Professor Plucknett says, in speaking of Tregor's Case: "Coke tried to make the case prove that In many cases the common law will control acts of Parliament and sometimes adjudge them to be utterly void," but was unsuccessful, in spite of his shamelessly misquoting the report."

sion here declaring any act of Parliament void. Nor is there even any suggestion of the right of any court to declare an act of Parliament void. All that Judge Herle said, according to Coke's own account, is that some statutes are made against law and right, and that therefore those who made them would not put them into execution when they perceived the true situation. All that this could possibly mean is that lawmakers sometimes made bad laws, and that when their attention was called to it they either repealed them or let them fall into desuetude.

One therefore wonders why Coke should have quoted this case at all. Professor Plucknett, in the essay above referred to, suggests that Coke quotes this passage for the idea contained in the italicized words of a superior or fundamental law or right, a superior, that is, to the law as made by the lawgiver. And Professor Plucknett is probably right. But, and here is the rub, Professor Plucknett shows that the italicized words are not contained in the Year Book at all, and that these words were interpolated by Coke himself. In other words, Coke falsified the record in order to make it appear that the idea of a paramount law and right, superior to the concrete law of the lawgiver, "was well recognized in English"

jurisprudence," to borrow a phrase from Mr. Daugherty.

The next case, Cessavit 42, was also considerably embellished by Lord Chief Justice Coke, as is shown by Professor Plucknett. However, the embellishments in this case are not very important. What is important, however, is that there was no decision in that case declaring an act of Parliament void. What we find in the report is that a certain case which should have been decided in a certain way according a statute known as the Statute of Westminister 2, Chapter 21, was actually decided differently, but no opinion was given by the judges for their decision. It is true that Coke says in connection with this case that the decision was given in the manner that it was given "because it would be against common right and reason the common law adjudged the said act of parliament as to that point void."

But the words quoted are an interpolation, or at least an addition, of Coke's, in the nature of a comment on the case. The case itself says nothing either about the law in question being against common right and reason or about the judges declaring the statute

void.

As already stated, the judge or judges who decided the case gave no reason for the decision. The true reason may have been ignorance of the statute in question. Or it may have been even worse than that, as occasionally happened with judges in those days. It is also possible, of course, that their reasons were quite praiseworthy, although not the ones assigned by Coke. Whatever they were, we certainly do not know them. And as the modern lawyers say: "No opinion' covers a multitude of sins."

The third case (Rous v. an Abbot; also known as the Case of the Seals) clearly has no relevancy whatever to the question here involved. The point involved in that case was a conflict between the Canon Law and a lay statute, and Brinton Coxe discusses it at great length in his review of the Canon Law in the Middle Ages, in support of his contention that when there was a conflict between the Canon Law and a lay statute before the Reformation, the lay statute had to give way. But, as we have explained elsewhere, this was upon the ground that the Canon Law and the Common Law were foreign to each other, so that quite apart from the question of the superiority claimed by the Canon Law on the ground that the spiritual law was superior to the temporal, the Canon Law had to prevail when it applied to the case. Temporal courts had to recognize the Canon Law, of course, and to apply it when ecclesiastical questions came into consideration. now, for instance, French courts may apply American law where Americans are involved, as is actually the case in modern French divorce law. Clearly these questions have not the remotest relation to the question of the superiority of the Common Law over statute law, or the right of an English judge administering the laws of England to declare an act of Parliament void on the ground of its alleged repugnancy to the Common Law.

But Professor Plucknett, in his essay, adds the important point that there was no decision in this case at all, but only a discussion

of the questions involved.

"We are told of no judgment—says Professor Plucknett—but only the 'opinion' of the court, and this does not necessarily mean more than that the reporter believed that the court inclined to one side rather than the other."

In addition, Professor Plucknett calls attention to the fact that other points were involved in this case besides the one of alleged repugnancy to the Common Law, and that there are many other reasons why this case is not an authority for anything in particular. Professor Plucknett's judgment upon this case is particularly interesting, since it comes from a great admirer of Coke and his influence on the "American Doctrine." Says Professor Plucknett:

"How far, then, is the case authority for the thesis which Coke builds upon it? In the first place, there are the very serious objections that the report is scanty and only tells of the debate upon one point, although we know that many other questions were raised and discussed in the case. Consequently, it becomes all the more necessary to insist that the passage that we have in the Abridgement is not a judgment, but what the reporter believes to be the 'opinion' of the court on this one point that happened to interest him. Probably no judgment was given at that hearing, but only an adjournment to a later term, by which time the court may

well have changed its opinion, or counsel have shifted their arguments to other and less controversial grounds—a frequent occurrence in Year Book cases. In the report as we have it, there is no discussion whatever of the proposition that the statute was void, but merely Pole's plea, immediately followed by the court's opinion. In view of this drastic suppression of the arguments pro and contra, which we know were numerous, it would be very hazardous to assume that we can accurately reconstruct the court's sentiments upon the subject, seeing that all information as to the divergent points of view of the various counsel, which is equally necessary for a correct interpretation of the case, is completely lost. In addition to this it is impossible to tell what weight (if any) this point had in determining the court's judgment (if such there was), for other points were debated. Historically, therefore, the case contains far too many unknown factors to be used with any degree of confidence or safety."

The last two cases cited by Coke—one anonymous and the other known as Strowd's Case-refer to the same statute, known as 1 Edw. VI, Chap. 14; and had to do with the confiscation of church property as part of the English Reformation. Briefly stated, the point was this: Many of the lands which were taken away from the religious institutions and turned over to the crown were subject to rights of third parties, including various kinds of rentpayments, some of which were not payments in money but in service. The statute in question provided that the rights of third parties who had these various claims upon the lands taken from the religious institutions should be saved, that is to say, that these various rent-payments or services should continue, so that these third parties would not be injured by the confiscation, which was a measure directed only against the Roman clergy. The question discussed in these cases is: what happens to a rent "service" when the King becomes a tenant in succession to a church or a convent? Surely, the King could not be expected to do service to his own subjects. And the way Coke puts it (and he discusses these cases at some length, evidently considering them important authority) it would appear that the courts decided that the statute in question was void in such cases on the ground of absurdity.

One would think that this is not much of an authority even if these cases had been just what Coke claims them to have been. For it is an ordinary rule of statutory construction as laid down by Blackstone, who believed in the omnipotence of Parliament, that where a statute is in general terms and some situation arises where it would be absurd to apply the statute literally, it is proper to assume that the lawgiver had not intended it absurdly and had not included the particular case in the general terms. There would therefore have been nothing in these cases countenancing Coke's

theory, even if the statute had actually been disregarded in the decisions.

As a matter of fact, however, the cases are not at all as Coke would have us believe. As a matter of fact, the decision of the court in both of these cases gave judgment in accordance with the provisions of the statute in question. How, then, did Coke happen to cite these cases, and discuss them at great length as alleged "authorities" for his famous doctrine?

The answer is this: In the first of these cases, the court in the course of the discussion said that a law which would make the King pay "rent service" could not be enforced "because of absurdity"; and that . . . therefore the rent ought to be called by a different name, namely, rent sec.

It should be noted here for further elucidation of the case that "rent service," although originally meant to be paid by actual services, had by this time become money payments, but that they were enforced in a different manner than ordinary money rent, namely by "distress and avowry"; and that by these decisions the claim, which the court turned into rent sec, could also be enforced by means of "distress and avowry." Says Professor Plucknett:

"At first sight the decision (in the first of the cases referred to) sounds drastic, but the reporter goes on to explain that even if the tenure is extinguished nevertheless the rent services which were part of the tenure can still be exacted by the lord from the King's grantee by means of distress and avowry. The situation is curious: the court, greatly daring, refused to recognize the express words of the statute in favor of rent service, and roundly declares them non obstante the act; but what it takes away with one hand, it prudently restores with the other, for it concedes that the quondam lord—we may no longer call him lord after the king's seisin—may still exact his rent by way of distress. In fact, the court's temerity had no practical result whatever beyond the change of one single word, as we may learn from Strowd's case, in which the matter was finally settled thus:

"'If a man has lands which were once parcel of the possessions of chantry, and which came to the King under the Statute of Dissolution at the time of dissolution, and were formerly held of someone else by rent and fealty (i.e., by rent service) or by service which is chivalry, the King's patentee shall now hold the tenements according to the patent (i.e., of the King) and not of the former lord and his heirs, and by the services by which they were anciently held, save that the same rent that was formerly rent service, he shall pay as a rent charge distrainable of common right only by the said person who was formerly lord and his heirs. And thus was the saving in the said statute expounded by the Justices of the Common Bench.'

"The question is now displayed in its right proportions. The decision is identical with that in the anonymous case which we have just mentioned, but without the rhetoric. The ostentatious judgment 'notwithstanding the saving in the act' is now reduced to its proper place as being merely an expounding of the statute. The act saves these rents, and so did both of the judgments. The only difference was that the statute still called them rent services, although the judges, for technical reasons bordering on pedantry, preferred to call them rent charges. In the former case the court adopted this terminology with a pretentious flourish; in the second, it soberly described its action as simple exposition. . . .

"Nowhere does Coke's dogma of controlling common law appear in the reports of these cases, and the voidance of the statute on those grounds is certainly not 'adjudged in Strowd's case.'"

Such are the great Chief Justice's authorities and alleged historical foundation. The many cases have dwindled to exactly nothing.

And now a few words as to Bonham's Case itself as a decision. Dr. Bonham's Case figures very prominently in all of these discussions, and is usually referred to in a way to lead people to believe that Coke boldly came forth and on the strength of his great historical learning and knowledge of the common law defied Parliament and declared one of its acts void. It is in this grand manner that the learned committee of the New York State Bar Association speaks, in its reports, when referring to the "decisions" of Lords Coke, Hobart, and Holt.

But upon close inspection it will be found that this decision was no decision at all as far as our point is concerned, and that Associate Justice Gray of the United States Supreme Court was perfectly correct in referring to it as a mere dictum. Briefly stated, the case was this:

The Royal College of Physicians in London were incorporated by letters patent of King Henry VII, with power, among other things, to fine practitioners who were not admitted to practice by them, the fines to go, half to the King and half to the College. This patent was confirmed by the statute of 14 and 15 Henry VIII, Chap. 5, which in turn was confined by 1 Mary, Chap. 9, with the addition of a general command to the jailors to keep all such persons as the President of the college shall commit to them. One Dr. Bonham, a doctor of medicine of the University of Cambridge, had not been admitted to practice by the Royal College of Physicians, but nevertheless practiced medicine in defiance of the order of the college authorities, claiming that as a doctor of medicine of the University of Cambridge, the Royal College of Physicians had no jurisdiction over him. Thereupon the Censors without the President committed him to imprisonment. Dr. Bonham thereupon

sued the Royal College for false imprisonment, and the case came

on to be heard in the court presided over by Coke.

The case involved many points, and occupied the attention of the court during many terms. It was finally decided by a bare majority of the court. (Coke's enemies claimed that the majority of the court was against him, and that he had forced upon the court the decision of the minority. But this is not important here.) Coke's decision was to the effect, that, in the first place, the college did not possess the powers they claimed over unlicensed (as distinguished from *incompetent*) practitioners; and, secondly, that even if they did, they had not pursued their powers aright. He adduced many reasons in support of these points; and in the course of his argument in support of his views he made the statement and cited the cases discussed by us above.

Two things should be noted in this connection: In the first place, that this case does not involve any general law enacted by Paliament in its legislative capacity, but a grant made by the King and afterwards confirmed by Parliament. That the two things do not stand on the same footing is quite clear: A grant, which in its very implication gives away the people's rights, and in this case had the additional feature of being in the nature of a monopoly, may, and perhaps ought, on constitutional grounds, be construed narrowly as against the grantee. Nothing should go by implication, and it should never be construed so as to either create an absurdity

or work an injustice. On the other hand, a sovereign act of legislation is always presumed to be exercised on behalf of the people and for their benefit. An act of legislation is an act of self-

government by the people in their sovereign capacity, and their action is naturally to be judged by different rules, and to be ex-

pounded by different canons of interpretation.

But even more important than this consideration, is the fact

that nowhere in this long opinion does Coke presume to say that the act in question is invalid. No, not even by way of dictum.

In this connection, we desire to call attention to the following:

It has been repeatedly stated, and there can be no question of the fact, that Coke's so-called theory was not made the basis of the

It has been repeatedly stated, and there can be no question of the fact, that Coke's so-called theory was not made the basis of the decision in Dr. Bonham's Case, and that whatever he says in this connection is therefore mere obiter. Professor Plucknett has pointed out, in the same article already referred to, the fact that there were many points involved in this case, and that the question of constitutionally was only one of them. The decision is therefore not stare decisis in the strict sense of the word. But we desire to go a step further, and say that not only was Coke's theory not made the basis of the decision, in the sense that it was not the sole ratio decidendi of the case, but that it was not even the ratio for

² It is well to recall again Maitland's statement, quoted supra, Chapter V, note 2, to the effect that "It is always difficult to pin Coke to a theory."

any one of the five points made by Coke in support of his decision. The passage quoted and cases cited occur in the argument on Coke's fourth point, but an examination of his extended argument on this point will show that even as to that point Coke's so-called theory was dragged in by the ears, and had really no place there. Coke was merely following his usual habit of making the case a peg on which to hang a general discussion, whether it related to the case or not. And while the discussion may be interesting, in the sense that it shows the views which he entertained, or wanted to prevail, at this time, it has no real relevancy to the case itself. As we have already stated, Coke nowhere in this discussion says that the statute that he was considering is invalid. On the contrary, a very careful reading of the passages in question forces upon one the conclusion that Coke was not making an argument against the validity of the statute there under consideration, but for a certain construction that he was placing upon it. And while his language is not very clear, it can have only one meaning in this case, if the case is to have any meaning at all, and that is this: The statute must be construed in a certain way, for if it be construed differently it would work a certain legal absurdity; and such legal absurdity is not to be tolerated, as is evidenced by the fact that "it appears in our books," etc.

That Coke himself did not regard this passage of his opinion as part of his decision in the case is quite evident from the answer which he made to the charges which had been preferred against

him in connection with his report. Says he:

"In this case I am required to deliver what I mean by this passage therein, That in many cases the common law shall control acts of parliament; and sometimes shall adjudge them to be utterly void; for where an act of parliament is against common right and reason, the common law shall control it, and adjudge it to be void.

"The words of my report do not import any new opinion, but only a relation of such authorities of law, as had been adjudged and resolved in ancient and former times, and were cited in the argument of Bonham's case, and therefore the words of my book are these, 'It appeareth in our books, that in many cases the common law shall control acts of parliament, and sometimes shall adjudge them to be utterly void; for when an act of parliament is against common right or reason, or repugnant or impossible to be performed, the common law shall control this, and adjudge such act to be void. . . . Which cases being cited in the argument of this case, and I finding them truly vouched, I reported them in this case, as my part was, and had no other meaning than so far as those particular cases there cited do extend unto. And therefore the beginning is, it appeareth in our books, &c. And so it may be explained, as it was truly intended."

It is quite evident that Coke regarded himself, or at least wanted others at this time to regard him, merely as a reporter instead of judge, in this connection. That the passage in question was not the basis of the decision, anyone can see for himself.

"But—says Coke—I did not mean to declare my opinion even as obiter. All I did was to report the argument, and the cases cited in the argument, after finding that they had been correctly cited."

Whether the cases had in fact been cited in the argument, we do not know. That they were not correctly "vouched" we do know. But that's quite another story, in no way affecting the fact that they were not part of the decision nor the basis of the decision.

It may also be noted in this connection that his contemporaries did not regard those passages as part of the decision, although they did consider them as part of his opinions, which they claimed to be "extravagancies." In his report to the King on these charges, Chancellor Ellesmere said, with respect to the points selected for requiring Coke's answer:

"And these few, not to be special and principal points of the cases, which were judged, but things delivered by discourse, and as it were by expiation, which might have been spared and forborne without prejudice to the judgment, in the principal cases." (Bacon, Works, edition 1826, vol. 6, p. 434)

The net result of our entire investigation is therefore this:

- 1. There is absolutely no shadow of "authority" for the so-called "Coke theory" prior to the decision in *Dr. Bonham's Case*.
- 2. The decision in *Dr. Bonham's Case* was not based on any such theory. Nor does this theory in fact have anything to do with the decision of the case itself. The discussion in question was merely part of Coke's "discourse," "as it were by expiation." And it is doubtful whether Coke accepted even at that time this so-called theory, even by way of abstract opinion.
- 3. If Coke held such an opinion, he renounced it decidedly and emphatically during the latter part of his life, when he turned from an upholder of autocracy to a supporter of the popular, or people's cause.

We shall now turn to the other English "authorities" usually cited in support of the Judicial Power. The authorities most frequently cited in this connection are Lords Hobart and Holt. But occasionally Lord Bacon is also appealed to for support. And sometimes the searchers for "precedents" go back even of Lord Coke, citing the case of the Sheriff of Northumberland, supposed to have

been decided in 1485. Godden v. Hales itself is supposed to have been decided on the authority of the Sheriff's case.

Lords Hobart and Holt, being the most frequently cited in this connection, will be discussed first. The reference to their alleged decisions by the Special Committee has already been noted. Let us see what those "decisions" really amount to.

Lord Hobart is supposed to have upheld Coke's doctrine in a case entitled Day v. Savadge, decided in 1614, and Lord Holt is supposed to have followed him in a case entitled City of London v. Wood, decided in 1701. The first thing to be noted about these two cases is that each involves exactly the same point as those involved in Dr. Bonham's Case: namely, a royal patent granting special privileges, which, if literally construed, would make the patentee a judge in his own case, which seemed to strike that generation with peculiar force, as the acme of injustice; a contention reasonable enough, when viewed abstractly, although later jurists and adjudicated cases were not overawed quite so much with the abstract idea of one acting as judge in his own case as were the jurists of the 17th century, and were rather inclined to examine each case on its own merits in order to discover whether the abstraction also contained some reality. An examination, however, of the actual cases in question will show that even as to that point neither Lord Hobart nor Lord Holt actually applied the theory as a ratio decidendi, but merely referred to Coke's opinion on the subject with more or less approval.

Day v. Savadge involved the following facts: Savadge had exacted from Day certain wharf-dues on behalf of the City of London. Day claimed that by the custom of the City of London he was not liable for these dues. The issue to be tried was whether or not the custom relied upon by Day really existed. In this connection the City claimed that by an ancient privilege, presumably originating in a royal patent, but claimed to have been confirmed by an Act of Parliament in the reign of Richard II, the Recorder of the City was empowered to declare what were the customs of the City. Day objected to this mode of establishing the custom on the ground that this would make the city a judge in its own case. To our notion this is rather a far-fetched proposition, but Lord Chief Justice Hobart, who, by the way, was Lord Coke's successor in the Chief Justiceship of the Court of Common Pleas, in which court Coke had a few years previously decided the famous Dr. Bonham's Case, proceeded to consider this point very seriously among other points involved in the case. The case did not turn upon this point, however, and would have been decided in the way it was decided no matter how this point was determined. But in passing upon this particular point, Coke's successor said:

"Even an Act of Parliament made against Natural Equity, as to make a man Judge in his own Cause, is void in itself for Jura naturae sunt immutabilia and they are leges legum."

It should be noted that Lord Hobart does not expressly endorse Lord Coke's theory; nor does he even refer to him. Hobart's dictum must, therefore, be confined to its own terms, which certainly do not lay down any broad general theory such as is claimed for Coke.

In City of London v. Wood, the City of London sued Wood in the Mayor's court for a fine due under a by-law of the City of London for refusing the office of Sheriff. The by-law in question provided that the fine may be sued for in any City Court of record of the City of London. Many points were raised by the defendant against the propriety of the recovery of the fine, among others being the point that the City would be judge in its own case, since

the court in which it sued was a City Court.

The first thing to be noted about this case is that by-laws of a city are, of course, in an entirely different class from Acts of Parliament, or of any other sovereign legislature. We have already referred to the well-settled legal proposition that by-laws of a municipality, like those of any other corporation, must be reasonable in order to be capable of being enforced in any court of justice. We need not, therefore, elaborate the point any further. This case would have nothing to do with our subject even if the decision had rested on this point. No Act of Parliament was even remotely involved. Nor even any royal patent confirmed by an Act of Parliament, as in Dr. Bonham's Case, or in Day v. Savadge.

Assuming that the powers of the City of London were originally granted by royal patent, as they probably were, and subsequently confirmed by an Act of Parliament, which is likely—it is clear that neither the patent nor the Act of Parliament could be made responsible for the by-law of the City of London. No more than the Legislature of the State of New York, which granted the charter under which the City of New York is governed, could be held responsible for some ordinance adopted by the Alderman of the City of New York. And a decision declaring such an ordinance unreasonable could not even by the wildest stretch of the imagination be held to involve the question of declaring an act of

the New York State Legislature unconstitutional.

That Lord Chief Justice Holt intended nothing of the kind is quite evident from his lengthy opinion in this case, as well as from the fact that his judgment was rendered in Anno Domini 1701, that is to say, after the Revolution of 1688, which in the opinion of all responsible jurists definitely and permanently established the supremacy of Parliament.

But Lord Holt in a very verbose opinion saw fit to refer to Lord

Coke's famous doctrine. Not, indeed, to his general doctrine, but to his doctrine in so far as it bore on this particular point, namely, the question as to what would happen if Parliament should enact that a man can be a judge in his own case. And in that connection he delivered himself of the following much-quoted and much-mis-interpreted statement:

"What my Lord Coke says in Bonham's case, in his 8 Co., is far from any extravagancy, for it is a very reasonable and true saying, that if an act of Parliament should ordain that the same person should be party and judge, or which is the same thing, judge in his own case, it would be a void act of parliament; for it is impossible that one should be judge and party, for the Judge is to determine between party and party, or between the government and the party; and an act of parliament can do no wrong, though it may do several things that look pretty odd; for it may discharge one from his allegiance to the government he lives under, and restore him to the state of nature; but it cannot make one who lives under a government judge and party. An act of parliament may not make adultery lawful, that is, it cannot make it lawful for A to lie with the wife of B, but it may make the wife of A to be the wife of B and dissolve her marriage with A."

It is a rather curious dissertation to be delivered by a celebrated jurist, and Professor Plucknett is quite right in saying that Lord Holt seems to have been greatly perplexed in his mind when delivering himself of it. And certainly there was something to be perplexed about, if one was brought up on medieval scholastic notions. On the one hand, there was this great terrifying notion of a person being judge in his own case. It is true, of course, that the City of London is not exactly a person in the ordinary sense, and a City Court of the City of London is not exactly a court held by an individual trying his own case. Our Judicial Power never shrank from enforcing such statutes. But if you will follow up the logic according to the rules of scholastic reasoning, you will find yourself in the position of a person trying his own case—a terrible thing to contemplate. But, on the other hand, there was the Revolution of 1688—which definitely established the Supremacy of Parliament. So definitely that no judge dared seriously question it. Lord Chief Justice Holt calls upon the shade of Lord Chief Justice Coke for counsel. He does not, indeed, adopt Lord Chief Justice Coke's famous dictum in Dr. Bonham's Case. But he tells us that it "is far from any extravagancy." (This expression clearly harks back to Chancellor Ellesmere's criticism.) And then, as if terrified even by this qualified approval of Lord Chief Justice Coke's supposed doctrine, he proceeds to assure us that an act of parliament can do no wrong, though it may do several things that look pretty odd."

That Lord Chief Justice Holt was very much perplexed in his mind generally is also evident from his peculiar reference to the Revolution of 1688. One of the "odd" things that evidently bothered him very much was the unceremonious way in which Parliament disposed of the English crown, while astute lawyers were arguing about "prerogatives." Hence his perplexed admission that Parliament "may discharge one from his allegiance to the government he lives under." And so the learned Chief Justice keeps on floundering to the end of his lengthy opinion. And it is this dictum that is referred to by the learned Committee of the great New York State Bar Association as the "decision" of Lord Chief Justice Holt to establish the wisdom of which the American Revolution is supposed to have been made.

Bacon is known to have been opposed to Coke's alleged theory, whatever it was. He was reputed to be the moving spirit behind the charges against Coke for the "extravagancies" contained in his Reports—of which Coke's famous dictum in Dr. Bonham's Case was one. But the searchers for "precedents" and "authorities" conveniently forget this fact—which should be decisive in our connection. And having thus put out of mind Bacon's position on the general subject of the power of the courts to disregard legislative enactments, they attempt to torture a stray expression of his with respect to the royal prerogative into some kind of recognition of the right of the courts to disregard such enactments of a special kind. But upon inspection even this limited claim proves

unwarranted.

The basis of this claim is a statement contained in his Maxims of the Law, reading as follows:

"So if there be a statute made 'that no sheriff shall continue in his office above a year, and if any patent be made to the contrary it shall be void; and if there be any clausula de non obstante contained in such patent to dispense with the present act, that such clause also shall be void'; yet, nevertheless a patent of a sheriff's office made by the king for term of life, with a non obstante, will be good in law contrary to such statute which pretendeth to exclude non obstantes: and the reason is, because it is an inseparable prerogative of the crown to dispense with politic statutes, and of that kind; and then the derogatory clause hurteth not."

The first thing to be noted about this passage is the absence of any reference to any power of the courts to disregard the statute. Now to the student of constitutional law this is the most important point in the entire discussion. Every one will admit that, theoretically, a law passed by a legislature which conflicts with basic constitutional provisions is an unwarranted enactment, and—theoretically, again—not law. Just as everyone will admit that theoretically a judgment rendered by a court which contravenes such

a provision is not a judgment, and—theoretically—null and void. But such admission of the theoretical limitations of the Judicial Power is very far from the admission of the right of a sheriff, for instance, to convert this theoretical limitation into a practical one to disregard such a judgment.³ But the same holds true in the analagous relation between courts and legislatures: the theoretical admission of the nullity of a statute contrary to basic constitutional provisions is by no means equivalent—indeed is not at all on the same plane of constitutional thought—with an admission of the practical right of a court to disregard such an enactment.

But we need not enter into these subtleties of constitutional theory. This passage from Bacon can be disposed of in a much simpler as well as a much more direct way. For upon closer inspection it will be found that Bacon was not dealing with any constitutional problem at all—not even with the law of the royal

prerogative.

A reference to Bacon's Maxims will disclose the fact that Bacon was dealing here with a problem of private law, and that nothing was further from his mind than the expression of an opinion on a basic question of constitutional law. And a careful examination of the quoted passage in its context will convince any unbiased mind that it has no constitutional significance whatever. The passage quoted occurs in Regula XIX, which is headed:

"Non impedit clausula derogatoria, quo minus ab eadem potestate res dissolvantur, á quibus constituantur."

This heading is in itself sufficient to disprove any connection between the subject-matter here dealt with and the constitutional problem which is involved in the Judicial Power. If this heading truly represents the matter here treated, we are clearly out of the domain of the problem which interests us—namely, the right of a court to disregard a law because of alleged repugnancy to a superior law. For this heading expressly declares that his Regula deals with the power of a power, or will, to limit its own future activities. And an examination of the body of this Regula shows that the heading truly represents its contents, and that the subject-matter with which it deals is as remote from our subject as two legal problems could possibly be. The introductory paragraph of this Regula is as follows:

"Acts which are in their nature revocable, cannot by strength of words be fixed and perpetuated; yet men have put in use two means of binding themselves from changing or dissolving that which they have set down, whereof the one is clausula derogatoria, the other interpositio juramenti, whereof the former is only per-

tinent to the present purpose."

³ Hence Bancroft's query, quoted before, "Who has ever heard of a sheriff refusing to execute a law because he thought it unconstitutional?" See, also, our discussion in Chapter X, supra.

After having thus made clear that his present purpose is merely a phase of the problem whereby a power or a will may set limits to its own future activities, and after having stated that the clausula derogatoria is also known as clausula de non obstante de futuro, he proceeds to lay down his legal rule, which is:

"This clausula de non obstante de futuro, the law judgeth to be idle and of no force, because it doth deprive men of that which of all other things is most incident to human condition, and that is alteration or repentance."

The rule of law thus laid, and which is the only subject-matter of this Regula, is expressly limited to self-imposed limitations, and expressly excludes the problem of a superior will or of limits set to a power by a superior power or will. And not only is the problem different, but the solution is exactly the reverse from that which it would necessarily be if we were dealing with the question of a constitutional repugnancy and the doctrine of judicial review. In the latter case, the later act is futile, because of inherent limitation of power; while according to the Baconian rule, it is the earlier act that is futile, because of the *unlimited* nature of power. The law judgeth the limiting act "to be idle and of no force," because one cannot set limits to his own will. This statement of the rule or legal maxim is followed by examples intended to illustrate it. The first example is stated thus:

"And therefore if I make my will, and in the end thereof do add such like clause (Also my will is, that if I shall revoke this present will, or declare any new will, except the same shall be in writing, subscribed with the hands of two witnesses, that such revocation or new declaration shall be utterly void; and by these presents I do declare the same not to be my will, but this my former will to stand, any such pretended will to the contrary notwith-standing) yet nevertheless this clause or any the like never so exactly penned, and although it do restrain the revocation but in circumstance and not altogether, is of no force or efficacy to fortify the former will against the second; but I may by parole without writing repeal the same will and make a new one."

And then follows the passage quoted before, referring to the

statute about the sheriff.

The significance of the example of a last will and testament cannot be mistaken: Like the heading, and the statement of the rule, it excludes the possibility of an intervening superior or outside will. And it is quite clear that in his second example, taken from the domain of the royal prerogative, Bacon had nothing but the same will in mind.

In their anxiety for the discovery of ancient authority, the supporters of the Judicial Power assumed that Bacon had in mind a constitutional conflict between the royal prerogative as part of the

"English Constitution" and an "ordinary" Act of Parliament, as the legislative organ of that same "Constitution." But this assumption is gratuitous. Nothing was, in fact, further from Bacon's mind. If Bacon had any such thing in mind it would have been utterly absurd to treat it as part of Regula XIX, and it would have been even more absurd to have this matter follow his example from a private will. The fact is that in the passage about the sheriff Bacon disregards the distinction between the King as law-maker and the King as Executive, and, for the purposes of his example, treats the King who makes the statute and the King who grants the patent as the same power. It should be remembered in this connection that it is a Tudor royalist who is speaking, to whom the phrase "the King in Parliament" was no mere phrase. It was the King who was making the laws, just as it was he who was executing them. The point that Bacon was making was not that the "statute" was inoperative because of any limitation of power in the enacting body, but because the King's power was unlimited, and he could not, therefore, even with the assistance of Parliament, limit his own power—any more than a private individual could make a will limiting his own power to make future wills contrary to the provisions of his earlier will. That is why the example about the sheriff follows properly and logically upon the example about the will.

All of this becomes even clearer when we take the passage about the sheriff in connection not only with what precedes it but also with what follows it. It is followed immediately by a paragraph reading:

"So if an act of parliament be made, wherein there is a clause contained that it shall not be lawful for the king, by authority of parliament, during the space of seven years, to repeal and determine the same act, this is a void clause, and the same act may be repealed within the seven years; and yet if the parliament should enact in the nature of the ancient lex regia, that there should be no more parliaments held, but that the king should have the authority of the parliament; this act were good in law, 'quia potestas suprema seipsum dissolvere potest, ligare non potest': for it is in the power of a man to kill a man, but it is not in his power to save him alive, and to restrain him from breathing or feeling; so it is in the power of a parliament to extinguish or transfer their own authority, but not, whilst the authority remains entire, to restrain the functions and exercises of the same authority." (Bacon, Works, edition 1826, vol. 4, pp. 61-62)

No one will dispute the assertion that the question here considered is the power of an unlimited power to impose limitations upon itself as to future action. Which shows conclusively that there was no break between the first example used by Bacon (that

of a last will and testament) and the second (that of the sheriff), and that the entire Regula XIX was intended to and does deal with the same subject—the subject so clearly announced in the heading: The futility of attempted self-limitation by a power otherwise unlimited.

But while this disposes of Bacon, it does not by any means dispose of the sheriff's case. For the sheriff's case referred to by Bacon was not an imaginary one, but clearly an allusion to a case which has actually occurred and is known in the literature of our subject as the Sheriff of Northumberland's Case. And this case exists as a "precedent" outside of Bacon's reference to it. It is not, indeed, cited very often; but every once in a while it crops up in these discussions, and once at least it has played quite an important part in a famous historical case not unconnected with our subject.

Our readers will recall the great importance which the learned Special Committee of the New York State Bar Association attached to the case of Godden v. Hales. And the Court in Godden v. Hales relied on this Sheriff's Case as authority. Let us therefore examine

this famous case a little more closely.

In Godden v. Hales, the Court, speaking through the Chief Justice, said, referring to this case: "that the case of the Sheriffs in the second year of Henry the Seventh, was law, and always taken as law."

One would certainly assume that a case thus "vouched for"—to use Lord Coke's famous phrase in his defense to the charges of "extravagancy" in connection with Dr. Bonham's Case—actually decided what was claimed for it. Or at least decided something. As a matter of fact there never was such a case in the sense of a decision. This is conclusively established by Professor Plucknett in the article already referred to.

"Reference to the Year Book—says Professor Plucknett—shows clearly enough that some such case arose, but we are told most definitely that 'forasmuch as this was the first time, the Justices, Sergeants, and King's Attorney agreed that they should study the matter well, and then be heard; and what they said counted for nothing since they wished to retain their freedom to say what they liked, and to consider what they had said up till now as nothing.' With these words the report concludes and nothing is known of the later history of the case. There is, moreover, in Brook's Abridgement another report of the case which is still more emphatic; 'and the matter was let drop on this day and nothing was adjudged,' we there read. There could hardly be a more explicit warning against using it as a precedent, or regarding it as adjudg-

The learned Prof. Haines also considers this case a "precedent." On page 30 of his Judicial Supremacy, he says: "Other instances cited are the Sheriff's Case (2 Henry VII) where a patent of the King was held to be good notwithstanding a statute to the contrary."

ing or deciding upon any point of law; and yet in defiance of this disclaimer in the report itself, we find it quoted in Calvin's Case as 'agreed.' It was all to no use that the authority of the case was afterwards denied, for in Godden v. Hales, the court apparently felt that if there was no such decision in The Sheriff's Case there ought to have been, and so they proceeded to raise the case post-humously to the dignity of a precedent after the lapse of two hundred years by adjudging 'that the case of the sheriffs in the second year of Henry the Seventh was law, and always taken as law.'"

But even this does not exhaust the interesting features of the famous Sheriff's Case. In order that we may see the case in its true proportions, we must quote another passage from Professor Plucknett. After having disposed of the case as a case, that is to say as an adjudicated case, Professor Plucknett has the following to say with reference to the matters discussed in the arguments:

"As for the substance of the arguments reported in the Year Book, still further comments will have to be passed. As both Coke and Bacon remark, the report alleged that the statutes 28 Edw. III, c. 7, and 42 Edw. III, c. 5, forbid any sheriff from serving more than a year in his office, even if his patent should contain a clause non obstante this present act; and that Henry Percy claimed to hold office under such a patent appointing him Sheriff of Northumberland for life notwithstanding the statute. There are two facts which are very material to the discussion, but which do not figure in the Year Book report at all. The first is that the statutes quoted contain no such provision forbidding clauses of non obstante. The second is that this provision does occur in another statute, viz. 23 Hen. VI, c. 7, which is not mentioned in the arguments, but this very act contains also an express saving of the rights of those sheriffs who held office for life. Percy's patent is therefore perfectly valid under the statute. We may suggest a reason why this novel debate in the Year Book was never resumed; when the judges and sergeants and the King's attorney eventually 'studied the matter well' they must have discovered the existence of this statute of Henry VI and the saving it contained in favor of shrievalties in fee. Once this statute was found, further argument became unnecessary. Finally it will be observed that the situation discussed by Coke and Bacon of a patent attempting to dispense with a statute although the statute itself forbids it, did not arise in this case at all."

We have therefore the following situation: Somewhere towards the close of the Middle Ages there was a case in which a point was raised based upon an erroneous assumption as to the existence of a certain statute, and thereupon the learned gentlemen in the case proceeded to discuss at large as to what ought to be done under these circumstances. As the supposed statute seemed to be in

derogation of the powers of the King, these gentlemen were naturally perplexed—much as Lord Chief Justice Holt was a couple of hundred years later. On the one hand there was the king, whose power toward the close of the Middle Ages seems to have been absolute and unquestioned. On the other hand, there was also the rising power of the people, which was just emerging, and which evidently had to be reckoned with—at least in England. The gentlemen therefore decided to take time to think the matter over. Having had some time to consider, they evidently discovered to their relief that the whole difficulty was imaginary, since there was no such statute as they had supposed. Whereupon they naturally did nothing to follow up the great discussion—for, to use the old Hebrew saying, "there were no bears, nor yet any woods."

But after the lapse of centuries, some learned lawyers proceeded to cite the discussion upon a false premise, as if it were an authentic and adjudicated case. And a great court proceeded to cite this imaginary case as authority for one of the most important decisions ever rendered by a court of justice—so important as to require a revolution to reverse it. We need not stop here to consider whether the assurance of the Court in Godden v. Hales that the Sheriff's Case was "always taken as law" was due to mere ignorance or corrupt servility to royal power. But whatever it was, it was effectually put an end to by the revolution of 1688. And with it ended the entire discussion of this problem, except as a reminiscence,

such as Holt's allusion to Coke a few years later.

And now a few words as to the possible American echoes of this celebrated case. It is the theory of those who bring this case forward as a "precedent" that somehow this case and the knowledge of it tended to put Judicial Review into our constitutions, state and federal. How much our Revolutionary Fathers who were concerned in the framing of our state constitutions and of the United States Constitution actually knew of the true history of the great case of the Sheriff of Northumberland it is, of course, difficult to say. The chances are that they knew precious little about it. But they may have known that it was used as an authority in Godden v. Hales. If so, their love of and reverence for Government by Judiciary could not have been increased by such knowledge. In fact, it could not have been increased by knowledge of the Sheriff of Northumberland's Case, whatever that knowledge was: If they took the lawyers' and judges' word for it, there was an additional judicial decision to hate and detest. And if they knew as much about it as we do, then there was an additional reason to hate the judicial decision in Godden v. Hales, which was not only base and servile in itself, but in addition bolstered up by ignorance at best, and by bearing false witness at worst.

We may now turn from the rather serious aspects of our subject, presented by the case of the Sheriff of Northumberland, to a

humorous one presented by another famous "precedent," known in the literature of our subject as the Case of the Manor of Dale. And here again we must avail ourselves of the labors of Professor Plucknett, to whom we are already so much indebted.

In the course of his argument in Dr. Bonham's Case—for the proposition, as we believe, that laws must be interpreted reason-

ably—Coke says:

"So if any act of parliament gives to any to hold, or to have cognisance of, all manner of pleas arising before him within the manor of D., yet he shall hold no plea to which he himself is a party; for as hath been said, iniquum est aliquem suae rei esse judicem."

It was correctly assumed by Coke's successors in the compilation of English laws and precedents that the "D" used by Coke stood for Dale—the manor of Dale having figured before in English legal literature. But most of them being a rather uncritical lot they very incorrectly assumed that Coke was speaking of an actual case instead of an imaginary one. Perhaps this was due to Coke's own confused, or rather confusing, style. At any rate, Coke's statement quoted above gave birth to a new "case" in the literature of our subject—the "Case of the Manor of Dale." And by mere dint of repetition this imaginary "case" acquired such a respectable standing that even so careful a writer and discriminating a scholar as Professor Corwin was caught in the net. With the result that in his The Doctrine of Judicial Review—one of the few really worth-while books on our subject—he inadvertently "vouches" for this case in a passage, in which he says, speaking of Lord Coke:

"Returning to Bonham's Case, we find him citing in support of his dictum a case arising in the manor of Dale, where it was held that an act of Parliament conferring in general terms upon a specific person the jurisdiction of cases arising in the manor did not apply to a case to which that person was an interested party."

Now comes Professor Plucknett and makes the point that not only was Coke's case an imaginary one, but that the "Manor of Dale" was only an imaginary manor. It seems that the "Manor of Dale" played in the early legal literature of England the same rôle as that played in our own legal literature by those famous and persistent litigants "John Doe" and "Richard Roe"—plaintiff and defendant, respectively, in the famous case of "John Doe v. Richard Roe."

APPENDIX B

ALLEGED COLONIAL PRECEDENTS

The situation with respect to colonial precedents is somewhat different from that with respect to state precedents. As to state precedents, it may be said that, with the possible exception of Coxe, all historians agree that there were such precedents, even though they may not agree as to their number or importance. As to colonial precedents, on the other hand, there is no such consensus of opinion. In fact, until recently responsible historians have fought shy of making any positive assertions in regard to them. But there is a noticeable change of late which threatens to create a "settled opinion" to the effect that there were such precedents. As in the case of many state precedents, our leading authority is Prof. Haines. On page 68 of his *Judicial Supremacy* he sums up the position of his school as follows:

"Although there are but few cases recorded in which colonial courts refused to enforce laws because repugnant to their charter or the laws of England, a reasonable interpretation of the evidence available appears to favor the view that restraints upon the colonial legislatures were enforced by the English courts of last resort, and

in exceptional cases by colonial courts."

In a footnote appended to this statement, there is a reference to Thayer's Cases on Constitutional Law as supposed authority for the statement. But an examination of Thayer's work fails to dis-

close any warrant for the reference.

Upon returning to Haines' own discussion which precedes the paragraph just quoted, we shall find reference to only two cases which could possibly bear on the question as to whether or not "colonial courts refused to enforce laws because repugnant to their charter or the laws of England." Such cases, if there were any, would not be real "precedents." At most the situation would be analagous to our state judges declaring a state law unconstitutional on the ground that it is repugnant to the United States Constitution, which is, of course, a different matter. It must be remembered in this connection that the colonial charters were not constitutions adopted by the colonies themselves, but grants made to them by the English Crown or Parliament. But we need not pursue this matter further—for the simple reason that there were no such

"exceptional cases" as is claimed by Prof. Haines. For in neither of the cases referred to was a law of the Colonial Legislature de-

clared unconstitutional by a colonial court.

The two cases mentioned by Prof. Haines are Frost v. Leighton and Giddings v. Browne. We shall consider the second case first, since it is the earlier as well as the more important from the point of view of the precedent-seekers. Following is the account of this case given by Prof. Haines:

"Giddings v. Brown was also one of the notable instances wherein a colonial court claimed the right to invalidate legislative action. A Massachusetts town voted its minister a dwelling, and a suit was instituted in 1657 to compel the payment of a tax levied for this purpose. Magistrate Symonds, basing his judgment upon English law and colonial precedents which he regarded as binding, held the vote of town meeting void. In the course of his judgment he said:

"The fundamental law which God and nature has given to the people cannot be infringed. The right of property is such a fundamental right. In this case, the goods of one man were given to another without the former's consent. This resolve of the town being against the fundamental law, is therefore void, and the

taking was not justifiable.'

"The decision was based upon the ground that fundamental natural law was superior to ordinary legislative enactments, and the court assumed that it was a judicial duty not to give effect to

an act contrary to this superior law."

In a footnote Prof. Haines refers to an essay by Professor Paul S. Reinsch under the title Colonial Common Law, published in Select Essays in Anglo-American Legal History, as his source of information. Upon turning to Reinsch's article in the Select Essays, we find that Reinsch's source of information was an account by the well-known Massachusetts historian Thomas Hutchinson, who was both Governor and Chief Justice of that Colony, in Vol. II of the Hutchinson Papers.

It may perhaps be of interest to note, in the first place, that in his essay Prof. Reinsch does not discuss the American doctrine of constitutional law; and that he cites the case not for the purpose for which it is cited by Haines, but for an entirely different—almost opposite—purpose. He does, however, use one ill-considered and very unfortunate phrase, which is Prof. Haines' excuse for the creation of a "precedent"—in disregard of all the rest of Reinsch's article as well as of the original source, which Prof.

¹Prof. Haines gives the date of Frost v. Leighton as 1639, instead of 1739. This should ordinarily be laid at the door of the "printer's devil." But that poor devil must be absolved in this case. Nor is it a mere slip of the pen. Prof. Haines evidently took the date seriously, notwithstanding its incongruity, as it is the only conceivable reason for his discussing this case ahead of Giddings v. Browne.

Haines evidently considered unnecessary to consult. The sentence which gave Prof. Haines the excuse for naming Prof. Reinsch as sponsor for his "precedent" is as follows:

"The opinion—says Prof. Reinsch—is interesting as an expression of natural law philosophy, and it is, perhaps, the earliest American instance where the power is claimed for the courts to control legislative action when opposed to fundamental law."

But the "fundamental" law of which Prof. Reinsch speaks is neither charter, nor the law of England, nor any other constitutional document. It is the law of God. And Prof. Reinsch specifically says that Magistrate Symonds did not base his judgment on English law, as is asserted by Prof. Haines. Nowhere does Reinsch say that the colonial courts exercised, or even claimed, the power to declare laws unconstitutional because of repugnancy to their own charters or the laws of England. And what he does say indicates his opinion to be that, in practice, at least, the so-called "fundamental law," i.e. the law of God, was not fundamental in the sense of superiority, but merely in the sense of general applicability—a sort of reserve of law to be used where the Legislature has not provided any definite or specific law for the guidance of the courts.

In the section of his essay dealing with Massachusetts—which contains the reference to our "precedent"—Prof. Reinsch opens

the discussion with the following general observations:

"The ideas of the Massachusetts colonists on the matter of law appear very clearly from a resolve of the general court of the year 1636. The government is there entreated to make a draft of laws 'agreeable to the word of God' to be the fundamental laws of the commonwealth. This draft is to be presented to the next general court. In the meantime, the magistrates are to proceed in the courts to determine all causes according to the laws then established (the early laws of the general court), and where there is no law 'then as near the law of God as they can.'"

As to the actual practice of the courts he says:

"Turning now to the practice of the magistrates and courts in the actual conduct of cases we shall find the same principles universally acknowledged. Everywhere, the divine law, interpreted by the best discretion of the magistrates, is looked upon as the binding subsidiary law; while the common law is at most referred to for the sake of illustration."

In the single paragraph devoted to our "precedent," Prof. Reinsch says that Magistrate Symonds was a great admirer of the English common law, and that in his opinion in our case, Symonds refers with respect to the English law, but that "he used it merely for illustration." And the sentence which we have quoted above

as giving Prof. Haines his handle is followed by the following sentence:

"The case, moreover, shows very clearly in what light the common law was regarded by the New England colonists; not at all binding per se, but in as far as expressive of the law of God to be used for purposes of illustration and guidance."

Prof. Reinsch then refers to the prejudice against lawyers which was "general in the colonies, but especially strong here," and winds up the discussion by the following statement:

"In Massachusetts, during the 17th century we find a continued, conscious, and determined departure from the lines of the common law. It is not accepted as a binding subsidiary system, the law of God there taking its place."

It would seem that the mere fact of the prejudice against lawyers should be sufficient to put any careful historian on his guard against fastening on the 17th century American colonists, and particularly the Massachusetts colonists, the peculiarly legalistic notions involved in the "American Doctrine." And it would also seem clear that according to Prof. Reinsch, at least, the law of God was the fundamental law, and that "fundamental" in this connection meant not superior to the written laws duly adopted by the Legislature, but merely a general reserve law—or a "binding subsidiary law," to use Prof. Reinsch's own phrase—to be resorted to when there was no express written law made by the Legislature. But to be on one's guard involves the exercise of an act of will, and that will is lacking where the will-to-believe is as strong as it is in Prof. Haines.

This becomes even more apparent when we turn from Prof. Reinsch to the original account of the case in the *Hutchinson Papers*. The first thing that strikes our eye on turning to the *Hutchinson Papers* is a footnote by Hutchinson himself, in which the noted historian says:

"The proceedings are somewhat singular and the arguments give us some idea of the notions of government prevailing in that day."

It is clear that Hutchinson, who was not only a historian of note but a great judge and lawyer as well, did not intend the account of this case as a precedent to be followed, but rather as a sort of museum piece placed on show as an example of the peculiarities of a by-gone age. If, therefore, this case had actually been what Prof. Haines says it was, it would still not be a precedent in the sense in which he trots it out before his readers—a precedent which was being followed at the time of the Revolution and the adoption of the United States Constitution. For in the opinion of so eminent a judge and lawyer as Hutchinson the

"proceedings" and "arguments" reported by him, whatever they were, were in his day archaic, and were reported by him for their singularity rather than for their binding force. And the account of the case fully justifies Hutchinson's estimate of the case and its interest.

Our discussion of the "proceedings" and "arguments" which Hutchinson considered of such interest as a relic of the then past, must begin at the end rather than at the beginning. While Hutchinson was interested in the "proceedings" and "arguments," we are interested in the decision—as it is that which makes the "precedent." And the first thing to be noted about the decision is that Prof. Haines' account leaves out one very important fact -indeed, the decisive fact, in our opinion-which is recorded at the end of the proceedings as contained in the Hutchinson Papers. That fact is that the General Court of Massachusetts, which was the court of last resort, reversed Mr. Magistrate Symonds' decision. It is rather odd, to say the least, that Prof. Haines should not have thought it important to report that fact, if he knew it -and he must have known it if he ever read the Hutchinson Papers. For, after all, the decision of a local magistrate does not create a "precedent," no matter how loosely we use that term, when his decision is reversed by a higher court, particularly when that court is the court of last resort.

And now as to the facts in the case. The important facts to be noted are these: First, that no law was involved, and no law was held invalid; and, second, that even in his opinion Magistrate Symonds did not claim that either he or any other judge in Massachusetts had a right to declare invalid a law passed by the Legislature of the Colony. Both of these points will become apparent from a recital of the facts as given in the Hutchinson Papers.

In the year 1655, the town of Ipswich invited a new minister, a Mr. Cobbett, and agreed to pay him £80 per annum for his keep and maintenance, and a house to live in. In order to provide the latter, the town meeting decided to raise £150 wherewith to build a house as a residence for the minister, whoever he might be. It seems that this was not satisfactory to somebody—presumably Mr. Cobbett. The matter was, therefore, taken up at another town meeting and it was decided to build, instead, a house for Mr. Cobbett—at a cost of £100—the house to belong to him in perpetuity, irrespective of how long he remained their minister. There was some dispute as to whether the later vote meant that the £100 needed for the erection of Mr. Cobbett's house should be raised by voluntary contributions or by assessment. The town was hopelessly divided on the question as to which was the proper mode of providing for a minister's dwelling, and feeling ran high.

As a result, some members of the community refused to make the contribution; and when their contributions did not come in by 1657, the town elders ordered Mr. Edward Browne, the town constable, to distrain the goods of the recalcitrants—having first determined what was the fair proportion of the £100 each of them should pay. Mr. George Giddings was among the recalcitrants. Mr. Browne therefore levied upon, or "distrained," Mr. Giddings' pewter dishes. Thereupon, Giddings sued Browne in trespass,

and Magistrate Symonds decided in favor of the plaintiff.

It is clear from this recital of facts that no law could have been declared unconstitutional in this case—for the good and sufficient reason that no law was involved. All that happened was that the town elders, or at most the town meeting, decided that Giddings should contribute so much towards the building of a house for Mr. Cobbett. But the Ipswich town meeting was not the Massachusetts Legislature. And that is exactly the position that Magistrate Symonds took—namely, that there was no law under which the proceedings were justified. Not that there was a law which he held to be invalid, but that there had never been any law passed by the law-making branch of the government. It is true that in the course of his "opinion," which is voluminous and discursive, Mr. Magistrate Symonds touched upon the nature and character of all law, both human and divine. But he seems to have had full warrant for that procedure in the very laws of Massachusetts under which he was acting, and which he was

seeking to enforce instead of nullify.

This brings us back to the paragraph with which Prof. Reinsch introduces the discussion of the condition of Massachusetts law at that period. It will be recalled that under the Resolve of the General Court of 1636, by which the Government was entreated to make a general draft of laws, it was specifically provided that in the meantime—i.e. until specific laws governing any subject shall have been promulgated by the proper law-making authorities -the magistrates were to proceed "as near to the law of God as they can." And, as Prof. Reinsch tells us, Magistrate Symonds did proceed according to what he conceived to be the law of God. But being learned in the law, he bolstered up the law of God by references to the law of man in the form of the Common Law of England. And his learned discourse in the laws human and divine led him to the conclusion that a town meeting cannot decide that Jones should make a contribution of so many pounds, or dollars, towards the building of a house for the town minister or towards the buying of a loving-cup for the town baseball champion. This point is stressed by Magistrate Symonds again and again: Each excursion into the realm of philosophy upon the nature of government and law always brings him back to his basic

point that there was no law of the Massachusetts Legislature which would permit a town meeting to compel Giddings to make

a present to Cobbett.

These are the two central points around which his long-winded arguments revolve: First, that the vote of the town meeting amounted to a decision to make Cobbett a present; and, second, that there had never been a law passed by the Massachusetts Legislature covering this particular point—because the law under which Browne justified did not refer to voluntary gifts, but only to the support and maintenance of ministers. And he considered the concurrence of both points necessary to his decision. The mere fact that the contribution demanded was a naked gift was evidently not sufficient in his own opinion to support a judgment for the plaintiff. In other words, he did not deny the power of the Legislature to make even a gift and then tax the community for the purpose of raising the necessary money to buy the gift. On this point Mr. Magistrate Symonds was quite positive, saying:

"The parliament may tax (and that justly) the whole country to give a guift or reward to one man for some service; for they are betrusted soe to doe. The reason is, it is levied upon the whole country, with their consent, and for the immediate benefit

of the whole."

Accordingly, there would have been nothing wrong in the community levying a tax for the purpose of raising the money necessary to build a dwelling house for the minister, even if that were a gift or gratuity. His point was: That this was not a general tax in order to raise a fund which was to be given as a gift to the minister, but that the major portion of the town decided that Giddings personally should give so much to Cobbett in order to help him build a house. And even as to that he does not deny the power of a really competent legislature to do it, even though it might be tyranny to do so, but only that the town meeting, which was not a legislature, could not do so. This becomes perfectly clear from the sentence which follows that just quoted:

"But—continues Magistrate Symonds—if they should doe it betweene persons (though they should soe doe by power, and the person wronged hath noe remedy in this world) yet it would be accounted tyranny. Is it not to take from Peter and give it to

Paul?"

It is because of this that he goes into long and intricate arguments in order to prove that the law of the Commonwealth of Massachusetts invoked on behalf of the defendant, and referred to in the discussion as the law of "fol. 9," does not cover the case at bar. Presumably, if it did cover it, "it should be accounted tyranny," but "the person wronged hath no remedy in this world." In fact, notwithstanding Mr. Magistrate Symonds' strong con-

victions on questions of property under divine and human laws, his strong objections to taking from Peter to give to Paul, and his great dislike of levellers and such, there seems to be nothing that cannot be done legally with respect to that same property and the process of levelling, provided it be done in accordance with the forms of law by proper legislative authority. And it is extremely significant that nowhere in his long opinion does Mr. Magistrate Symonds refer to the Massachusetts charter, or suggest that under that charter the Massachusetts Legislature was not competent to pass any kind of law.

There is one other thing, however, that we must consider before leaving this very interesting case. Prof. Haines says that in giving his decision Magistrate Symonds based his judgment upon English law and "colonial precedents." We have already quoted Prof. Reinsch as to the true light in which Magistrate Symonds regarded English law, and the quotations already made from his opinion clearly show that he certainly thought that under English law a judge had no right or power to declare a law of Parliament invalid. We must now say a word about "colonial precedents."

It would, at first blush, seem rather odd that in 1657 there should have been colonial precedents for what Prof. Haines claims Magistrate Symonds was doing-namely, invalidating a law on the ground of unconstitutionality. And it is even more odd that if there actually had been such precedents, that Prof. Haines, and his fellow-excavators, should have failed to unearth them, with the clues that Magistrate Symonds must have given them, if he actually cited such precedents. But the riddle solves itself simply: Magistrate Symonds did not cite any precedents for declaring any law unconstitutional. And for very good reasons. One reason is that there were no such precedents. Another is that Magistrate Symonds was not declaring any law unconstitutional. He did, however, cite precedents for what he was doing—and they are extremely interesting. We shall, therefore, quote verbatim his own account of some of them, so that the reader may see for himself what they were precedents for, and, incidentally, what Magistrate Symonds considered was up for adjudication. Magistrate Symonds cited three precedents. Here is his account of the first:

"In Ipswich, some years since, the towne greatly wanted a good chirurgeon, &c. and the inhabitants then generally being desirous of such a person to inhabite amongst us; the chiefe sort consulted how to effect it. It must cost above £50. to bring it about. It was concluded that it could not be justly done by way of rate, but each mans name being drawne out (according to a rate) such as were willing did signify the same, and the rest were left to use their liberty."

In other words, the precedents relied upon referred to what was

"justly done" by a town meeting, or the "chiefe sort" of the town, in solving such a problem as that which confronted the town of Ipswich when the question of building a house for minister Cobbett came up for consideration.

The second "precedent" is very much like the first, relating to the purchase by the town of Ipswich of a six-acre lot for a Mr. Jeffrey Snelling—reason or purpose not stated. The third and last "precedent" is the most interesting, for the light which it throws on the nature of the case at bar and its position as a "precedent" in the American doctrine of constitutional law, as well as on the position of Samuel Symonds, legal philosopher and sometime Magistrate of the good town of Ipswich, as a precursor of John Marshall. We shall, therefore, reproduce the substance of this precedent in Magistrate Symonds' own language. Says he:

"I remember the substance of it, and I suppose so doe many more. That towne of Weymouth did generally agree to provide an house and meet accommodations for the use of the ministry, to remaine for posterity. The matter came into the generall court. Mrs. Richards stood out, and not many (if any more besides) and although the court did soe well like their ayme, or the thing (in itself considered) as may by and by appeare, yet it was judged in court that they could not justly impose payment upon one, or more persons, not consenting. . . . Yet herein the court gave a testimony of their good liking in respect of the townes intent, viz. in that way to provide for the ministry. And accordingly the law was framed, and enacted for the future, that very court. The provision was not to give away, but to remaine to posterity, and the like provision was for every towne in the country; and that which a great part, if not the greater part, of Ipswich have desired and do still stand for."

This account by Magistrate Symonds of the "precedent," and his comment upon its application to the case at bar, not only gives us an insight into his motives for deciding the case the way he did, but states very clearly the legal reasons with which he tried to justify his action. His legal position was briefly this: That in the absence of any law duly made by the Legislature, the proceedings of the Selectmen of the town of Ipswich were unsupported in law; and that the law relied upon by them was insufficient warrant for what they had attempted to do.

Prof. Haines' other "precedent" is even more worthless than the one just considered. The facts in that case are briefly stated thus:

In 1730, a license was granted by the Crown to Ralph Gulston, London merchant, to enter upon any lands in Maine, the title to which stood in the Crown on October 7th, 1691, and cut down and remove a sufficient number of trees reserved for the Crown, then standing there, to enable him to carry out a certain contract for supplying the Royal Navy with masts and spars. Gulston was represented in Boston by Samuel Waldo, who, acting in his behalf, employed William Leighton to attend to the cutting and loading of the timber. Leighton cut some trees during the winter of 1733-1734 upon land belonging to John Frost, the title to which was in the Crown in 1691, and which, therefore, came within the timber reservation contained in the grant by the Crown. It seems that there was considerable feeling in the colony against the attempted use by the Crown of its rights under its old reservation. At any rate, in April, 1734, Frost sued Leighton in trespass, claiming £200 as his damage.

It seems that Leighton's counsel, Shirley, a well-known lawyer of Boston and subsequently Governor of Massachusetts, did not care to have his client tried by a jury because of the feeling on the subject in the colony, and so he interposed a special plea in bar, setting out the legal facts constituting his client's warrant for the cutting of the timber. The lower court overruled this plea, and directed him to plead over. This Shirley refused to do, and judgment was entered for the plaintiff; and the judgment was

affirmed by the Superior Court of Judicature.

So far, the only thing involved in the case was a question of pleading, which does not interest us here. At this point, however, what might be called a "constitutional" question arose, but not of a character to make it of any interest to us. This question was: Whether Leighton could or could not appeal to the Privy Council from the judgment of the Massachusetts courts. The Massachusetts charter then in force provided for such appeals only in cases involving £300 or more. Leighton's application for permission to appeal to the Privy Council was, therefore, denied by the Massachusetts court. Leighton's counsel, however, claimed that the charter provision and the action of the Massachusetts court did not prevent him from applying to the Privy Council for permission to appeal. His contention was that the limitation of £300 was merely a limitation upon appeals as of right, but not as of grace by His Majesty in Council. He, accordingly, applied to the Privy Council for the desired permission. This application raised some nice legal questions—there being respectable English legal authority for the proposition that His Majesty could do no such thing.

It seems that His Majesty's Council was somewhat perplexed as to what to do, and in their perplexity referred the matter to a sub-committee. This sub-committee reported that it had arrived at a solution of the knotty problem by consent of the parties. The

arrangement thus made was to the following effect: That the present judgment in Frost's favor should be vacated; the money collected by Frost on the execution should be refunded; and that Leighton plead over, pleading the general issue—which meant that the case would have to be tried by jury. A royal order was thereupon issued to the Massachusetts Superior Court of Judicature accordingly. However, when the matter came back to this side of the Atlantic, Mr. Frost abandoned the conciliatory attitude which he, or his representatives, had manifested in London. His counsel evidently considered himself in an impregnable legal position—at least on this side of the Atlantic—believing that he had a technical procedural advantage over his opponent, which, with a court favorably inclined, would secure him victory without even the small risk involved in a jury trial. He, therefore, took the position that there was no procedural rule under which the Massachusetts court could enforce the royal decree—and the court agreed with him.

There was another appeal to London, resulting in another royal decree, more elaborate and specific but to the same general effect as the first, directing that the original judgment be vacated, the money collected on the execution restored, and a new trial had on

new pleadings.

Leighton's counsel thereupon petitioned the Massachusetts Superior Court for an execution against Frost based on the royal order for the restoration of the money. But Frost was represented by very astute counsel, who presented an answer which helped the court out from its predicament, received the commendation of the

court, and gave him the decision.

Frost's general position seems to have been that the Privy Council was without jurisdiction to entertain Leighton's appeal; that it did not, as a matter of fact, reverse the judgment of the Massachusetts court in its capacity of a court of review; that its committee merely acted as a mediator in getting the agreement of the parties; and that Leighton's only remedy, therefore, was to sue Frost for a breach of his agreement. His general position is, however, of no importance here, as the character of "precedent" claimed for this case is based on the position which the Massachusetts court took in sustaining Frost's answer to the petition for execution under the royal order. On this point, Frost's counsel took the position that even if the royal order were to be considered in the nature of a judgment, the Superior Court of Judicature had no power to issue an execution thereon, for the reason that under the laws of Massachusetts that court could only issue an execution upon its own judgment. This clearly appears from the following extracts from Frost's answer to Leighton's petition; from the judgment of the court itself; and from the comment

of Judge Sewall on the case as reported in Willis' History of Port-land.2

In his answer to Leighton's petition, Frost said:

"For reasons why the court ought not to grant the execution he most humbly begged to show that by the charter the General Court of the province had power to establish laws and to constitute courts for trying all manner of causes arising or happening within the province. In personal actions where the matter in difference exceeded the value of three hundred pounds sterling, the party aggrieved by the judgment could appeal to the King in Privy Council. The Superior Court had been duly established by an act of the General Court which had received the royal approbation, and the justices had taken oath to administer the same after the laws and usage of this province. He conceived that this honorable court was not by law impowered to award execution upon the judgment of any other court, but could only do so on the judgment of the court itself, and the order for restoring the money not being the judgment of this court he humbly conceived that the court had not power to grant execution upon the same or by any such way enforce the payment thereof. He humbly conceived that the clause in the royal charter allowing appeals to the Privy Council where the matter in difference exceeded the value of three hundred pounds meant and intended that no appeal could lie unless the matter in difference exceeded three hundred pounds. If an appeal should be taken from a judgment in some manner not provided for in the charter and not according to the usage of this province, and if the parties made an agreement to have such judgment reversed and the money restored, then the party pretending to be aggrieved could pursue the party at fault in some other manner, but such agreement he conceived was not binding in this court."

The Superior Court in its judgment sustaining this answer said:

"The court now taking into their serious consideration the said Memorial and Petition together with the answer of Noah Emery Attorney at Law in behalf of the sd Jno Frost are of opinion, That they have no authority by any Law of this province, or usage of this Court to order such an Execution. And the Provision made in the Royal Charter respecting appeals to his Majesty in Council, does not as they apprehend, warrant any such Execution but points to a method of another nature in all appeals to be made conformable to the sd Charter. . . . As to this said John Frost bringing on a Review, or an action de novo, that so the said William Leighton may withdraw his former plea and plead the General Issue &c. By the Constitution of the Courts of Justice in this Province, that

American Historical Review (vol. 2, p. 229 et seq.), entitled The Case of Frost v. Leighton, which is Professor Haines' authority for this "precedent."

Action must begin first at an Inferior Court, and so come to this Court by appeal, and the Justices of this Court, when such appeal comes regularly before them will unquestionably endeavor that Justice be done between the sd Leighton and Frost."

Judge Sewall's comment is as follows:

"Mr. Emery, as counsel for the plaintiff, drew up an answer to

Mr. Auchmuty's petition, in substances as follows:

"That the Superior Court of Judicature was a court constituted by the law of the province, whereby they were authorized to hear and determine such civil matters therein mentioned as were made cognizable by them, and to render judgment thereon, and to issue execution pursuant to their own judgment and not otherwise. And if counsel for the defendant in this case had obtained a different judgment from what appeared upon their records he must go there for his execution, as they were not by law empowered to issue any execution contrary to their record of their own judgment."

It is clear, therefore, that no law of Massachusetts was ever called into question in this case, either by the Massachusetts Superior Court of Judicature or even by the Privy Council. Certainly, no decision of any kind was rendered by either court as to the validity or invalidity of any law passed by the Massachusetts Legislature. On the contrary, the actual decision—i.e., that the Court had no power to issue execution upon the royal order—was expressly predicated on the law of the province, which was considered controlling.

These are the "exceptional cases," in which, Prof. Haines assures us, "colonial courts refused to enforce laws because repugnant to their charters or the laws of England." And such, we may

add, is the "literature" of our subject.

APPENDIX C

MORE ABOUT AMERICAN STATE PRECEDENTS

The subject of American "precedents" deserves some further treatment at this place. There are two "cases" particularly which we desire to discuss here at some length. One is the case of Holmes v. Walton, briefly mentioned in the text; and the other is a "lost" Massachusetts case whose ghost stalks on the pages of some of the works of our precedent-seekers. Before we take up the discussion of these cases, however, we must say a few words on the subject of "reporting" prevalent at this early period of our judicial history, as that may throw some light on the entire subject of "precedents" and illuminate particularly one case discussed in the text—the

celebrated case of Commonwealth v. Caton.

When this case is referred to by historians of the subject, they are usually careful to put either in the text or in a footnote the magic notation "4 Call, 5"—indicating that this case is "reported" in a series of reports known as "Call's Reports," volume 4, page 5. To the student familiar only with our present system of reporting, this would indicate that the case is reported in some official, or at least authentic, series of reports, made and published under some official authority, contemporaneous with the case. There can, therefore, be no question as to the existence of the case, or the purport of the decision. To the ordinary reader, or even the student of the subject, the notation "4 Call, 5" carries the same guarantee of authenticity as the notation "1 Cranch, 137," when appended to a citation of Marbury v. Madison. Special students of the subject may go to the original decision of Marbury v. Madison as reported in 1 Cranch, at page 137, for the purpose of reading the entire opinion, or the arguments of counsel, or for the purpose of checking up on some particular point. But no one would ever dream of questioning the existence of the case, or of its general outlines, as given in histories or works of reference.

It is largely for this reason that the existence and purport of Commonwealth v. Caton and Holmes v. Walton has never been questioned, although the latter was never reported even in the manner in which Commonwealth v. Caton is supposed to have been "reported," as we shall see below, when we come to discuss the case. As a matter of fact, neither of these cases was actually reported at the time of their occurrence. Not only were they not

reported officially, but they were in fact not reported at all-not even in the private fashion in which Rutgers v. Waddington and Trevett v. Weeden were reported. The manner of the reporting, or the fact of non-reporting, of these two cases, is in itself of importance: it is quite inconceivable that, if the cases had actually been what is now claimed in their behalf, they should not have been reported by contemporaries. It is sufficient only to point to the fact of the reports of Rutgers v. Waddington and Trevett v. Weeden, to show how keenly alive the people were, at the period here under consideration, to all such questions. We have already seen that Rutgers v. Waddington was not at all a "precedent." But because it was thought by some people at the time to be an attempt by the Judiciary to disregard legislation, it was reported at great length in special pamphlet form, and created great excitement and commotion. The same is true of Trevett v. Weeden. But no contemporary publication refers either to Commonwealth v. Caton or Holmes v. Walton. If there were no other reasons for believing these cases to be mythical, this alone should be sufficient, nay conclusive, reason for such belief.

It is here that the question of the mythical designation "4 Call, 5" comes in: The fact that this case was never reported would long ago have led students of the subject to the conclusion that such a case never occurred, or if it did occur it could have no such import as is now ascribed to it, but for the general belief that the case was actually reported contemporaneously, and even officially, or at least semi-officially, by some recognized reporter. For the designation of a report by name and volume always indicates to the student of the subject either an official or a semi-official, at the very least, a contemporaneous report. And the prefix "4" before the name of the report tends to indicate that we are dealing not only with a recognized report, but with a well-established series, running into many volumes—the report being made by one who had spent some time in reporting a general series of cases, which in itself bears some mark of authenticity. But a glance at 4 Call, at page 5, will prove all of this to be entirely unfounded, leading to the conclusion that the case, at least as reported, is utterly un-

authenticated.

The first fact to be remembered in this connection is that the volume known as 4 Call did not appear until 1827—forty-five years after the alleged occurrence of the case, and after everyone connected with it, including the two judges whose opinions are reported, was dead. The second fact to be noted is that Mr. Call did not claim that his report was based on any official documentary evidence. On the contrary, Mr. Call himself, in his introduction to this volume, as well as in his introduction to the entire series, indicates that his reports are not based on official documents. In this connection a curious circumstance must be noted, with respect

to Mr. Call's reports. Mr. Call began the publication of his series in 1801, and published three volumes in close succession, these volumes appearing in 1801, 1802, and (probably) 1804. These reports cover cases occurring during the period from 1797 to 1803. In other words, the reports were almost, if not quite, contemporaneous with the decisions, and where there were no official documents the information was at least easily obtainable. The third volume contains, however, at the end, a number of cases supposed to have been decided in 1790. As to these cases the information was not so easily obtainable, and it is evident that Mr. Call, who started in as a real reporter—at least in the usual manner of those days, if not in our sense—was now beginning to reminisce, or to rely on reminiscences.

With the publication of these three volumes, Mr. Call's sources had evidently dried up. There was nothing further to report, at least for him. And he did not report anything for more than twenty years thereafter. Then, suddenly, Mr. Call took to "reporting" again, and published the fourth volume of his reports—as already stated, in 1827. The cases reported in this volume are clearly based on reminiscences, and not even reminiscences of his own, but of other people, and—we verily believe—largely upon his imagination. He certainly has drawn upon his imagination to fill in details, and these details are likely to be of the greatest importance in our connection. For our interest is not in whether Mr. Caton was or was not tried, but in the discussion that arose, the speeches that were made—for it is on the basis of these speeches, or at least one of them, that his case has been bolstered up into a "precedent."

In this connection, the character of Mr. Call, and his relations to the judges whose speeches he purports to report, is of some interest.

Mr. Daniel Call, the "reporter" in question, was born in the year 1765. He, therefore, could not possibly have had any personal knowledge about the case of Commonwealth v. Caton. He seems to have been a protegé of Judge Wythe, whose alleged speech has raised Commonwealth v. Caton to the dignity of a precedent. The first volume of Mr. Call's reports is dedicated to Judge Wythe. This dedication, as well as the dedication to the second volume, which Mr. Call dedicated to Judge Pendleton, show Mr. Call's close relations with, and special gratitude to, Judge Wythe. Mr. Call evidently felt obliged to explain why he should have dedicated the first volume to Judge Wythe instead of Judge Pendleton, who was the Chief Justice, and he explains it by his special gratitude to Judge Wythe, "who had directed his early studies." And an examination of the circumstances of the case clearly indicates that this gratitude to Judge Wythe led him to ascribe to the noted jurist a speech which he probably never made, but which his

grateful protegé thought would enhance his fame. In this connection it should also be noted that Judge Wythe had himself published several pamphlets containing his opinions—a number of them dissenting opinions. But no reference to his opinion in Commonwealth v. Caton is contained in any of these publications—thus clearly showing that Judge Wythe himself did not consider his opinion in this case of any importance—an utterly impossible attitude if the opinion as now reported be authentic.

We may now turn to the report of the case itself, as it appears in 4 Call. Mr. Call nowhere indicates the source of his report of this particular case. On the other hand, his bias in favor of Judge Wythe, and his evident desire to magnify the importance of the case, ad gloriam dei majoram, are clearly indicated in a note ap-

pended by him to the case. It reads:

"N.B. It is said that this was the first case in the United States, where the question relative to the nullity of an unconstitutional law was ever discussed before a judicial tribunal: and the firmness of the judges (particularly of Mr. Wythe) was highly honorable to them; and will always be applauded, as having, incidentally, fixed a precedent, whereon, a general practice, which the people of this country think essential to their rights and liberty, has been established."

It must be remembered that Mr. Call was writing in the year of our Lord 1827—when passions were running high, and when the subject of the Judiciary had become a matter of keen party and class struggle. Mr. Justice Gibson had just delivered his bodyblow to the Judicial Power in his famous opinion in Eakin v. Raub, and Jacksonian Democracy was on the march. It was clearly a time for all supporters of the Judicial Power to rally to its defense. And Mr. Daniel Call, whose state of mind is mirrored in the paragraph just quoted, was not above drawing upon his imagination in behalf of the good cause.

By a curious coincidence, it is at about this time that we first hear of Holmes v. Walton, in connection with the subject of "precedents." Holmes v. Walton is unfortunate from the point of view of the precedent-seekers in that it was never reported in any such authentic-looking collection as Call's Reports. But some of our more ardent reporters of "precedents" supply this unfortunate omission by putting after it the notation "4 Halsted, 427," usually with some remark which to a very careful reader indicates that the case is not actually reported in 4 Halsted, but only referred to therein. A more careless reader, however, may get the impression that the case is actually reported in Halsted—a recognized series of reports. And here is where the curious coincidence as to the time when we first get a glimpse of the two cases becomes significant. Halsted, as stated, was a regular series of reports. But

the report of the case which mentions Holmes v. Walton was highly irregular. The case which mentions Holmes v. Walton is that of State v. Parkhurst; and a glance at volume 4 of Halsted's reports will show that this latter case was not reported regularly. In fact, it is reported as an appendix to the volume which contains the usual reports of current cases, without any adequate reason for reporting this particular case at that particular time; and to one familiar with the subject, and with the period of our history in question, it is quite apparent that the motives which actuated Mr. Halsted in reporting this case were the same as those which actuated Mr. Call in reporting Commonwealth v. Caton—namely, to furnish ammunition for the partisan struggle which was raging at the time between Jacksonian Democracy and its opponents. In fact, the two reports show, notwithstanding the geographic distance of their respective places of publication, so many points of resemblance that one becomes painfully aware of a common source. Not necessarily the same authorship, in so far as the persons responsible for these reports are concerned, but the same fountain from which both reporters evidently imbibed their zeal as well as their wisdom.2

It is worthy of note in this connection that State v. Parkhurst is itself a noted "precedent" albeit a belated one. It is mentioned by the Special Committee of the New York State Bar Association as well as by Prof. Haines. The latter has the following notation: "Act of Assembly against the holding of two offices. Act held invalid as contrary constitution." What is said in the text with respect to the apocryphal character of this case disposes, of course, of this "precedent" also. But it should be noted here that this case is worthless as a "precedent," even if the opinion were genuine. In the first place, Judge Kirkpatrick's opinion is supposed to be a dissenting opinion-it could not, therefore, have held any law unconstitutional, whatever the opinion might say about it. But, what is more important, an examination of Judge Kirkpatrick's opinion as reported will show that even he did not hold any "Act of Assembly" unconstitutional. As the case occurred after the adoption of the United States Constitution, the matter does not strictly relate to our present discussion, and we cannot therefore discuss this case at length. But it is nevertheless interesting as showing how easily "precedents" are created even in "historic" times, so to say-during a period when, as pointed out further on, the State of New Jersey enjoyed the blessings of a fairly authentic system of court reports. Those who are inclined to pursue this inquiry further may read the case itself or our summary and comment in footnote 18 to the article in St. John's Law Review.

There is a curious affinity of style between the opinions, although Judge Wythe is supposed to have written his opinion in Virginia in 1882 while Judge Kirkpatrick is supposed to have written in New Jersey twenty years later, without having seen the opinion of his forerunner. In Commonwealth v. Caton, Judge

"I have heard of an English Chancellor who said, and it was nobly said, that it was his duty to protect the rights of the subject against the encroachments of the Crown, and that he would do it at every hazard. But if it was his duty to protect a solitary individual against the rapacity of the sovereign, surely, it is equally mine to protect one branch of the legislature, and consequently, the whole community, against the usurpations of the other; and, whenever the proper occasion occurs, I shall feel the duty; and, fearlessly, perform it. Whenever traitors shall be fairly convicted by the verdict of their peers, before the competent tribunal, if one branch of the legislature, without the concurrence of the other, shall attempt to rescue the offenders from the sentence of the law, I shall not hesitate, sitting in this place, to say to the General Court, Fiat justitia, ruat coelum."

With these preliminaries, we may turn to a consideration of the two cases in which we are particularly interested. They make their first appearance in the modern precedent literature in Mr. Meigs' article in the American Law Review referred to in the main text. In this article, Mr. Meigs mentions seven cases. Five of these have already been treated in our main text at some length. The sixth is Holmes v. Walton, which Mr. Meigs places on his list next to Commonwealth v. Caton, saying:

"Probably the next in point of time . . . was an obscure one in New Jersey, Holmes v. Walton, which is said to have decided that a provision in one of the seizure acts for the trial of certain cases by a jury of six was unconstitutional; but further than this

we have been able to discover nothing."

The last case on Mr. Meigs' list of precedents is the "lost" Mas-

sachusetts case, of which he says:

"It appears also that the Supreme Court of Massachusetts had somewhere about this time held an act unconstitutional; but further than the mere mention of the case in a letter from J. B. Cutting to Jefferson, dated July 11, 1788, we have been unable to discover anything."

Since the appearance of Mr. Meigs' article, the meager clues furnished or resuscitated by him have been elaborated in two articles with the result that at least one of these cases-Holmes v. Walton—has risen from the obscure place assigned to it by Mr. Meigs into one of the leading precedents. This transformation is due to the labors of Prof. Austin Scott, who has devoted considerable time not only to rehabilitating this case but also to lecturing and writing about it. His labors assumed final shape in an article which was published in the American Historical Review in 1899 (4 Am. Hist. Rev., 456).3 The Massachusetts case was written up by Mr. A. C. Goodell, Jr., in 7 Harvard Law Review, 415 (1894).

Since these two articles appeared, Holmes v. Walton, as already stated, has risen to the position of the leading precedent—to which position it is undoubtedly entitled if Prof. Scott's claims are wellfounded, as it would then be the first real precedent, since it preceded Commonwealth v. Caton; and the Josiah Phillips Case, the

And in State v. Parkhurst, supposed to have been decided in 1802, Mr. Chief

Justice Kirkpatrick is reported to have said:

⁸ Prof. Scott seems to have written independently of Mr. Meigs. In a footnote to his article in the American Historical Review, Prof. Scott states that he

first read his paper about the Holmes Case before a literary club in 1883.

[&]quot;I believe the time has not yet come in New Jersey, and I humbly trust in God it never will come, when a Court . . . will have anything to fear, either from legislative or executive interference on the one hand, or from the resentments or persecutions of party on the other. . . . But even were it otherwise, we are bound by an oath to administer justice according to the Constitution and laws of the state; and in so doing we shall at all times be able to adopt the maxim of our ancestors, and say, Fiat justitia, ruat coelum."

only earlier precedent ever mentioned, was certainly no precedent. On the other hand, the position of the Massachusetts case still remains doubtful, and careful writers do not class it among real precedents. Nevertheless, it is resorted to by the precedent-seekers whenever it is desired to present an impressive list. The Special Committee of the New York State Bar Association, for instance, includes it in its list, making the following entry:

"Mass. 1786. In Brattle v. Hinckley and in Brattle v. Putnam, 7 Harvard Law Review, 415-7, 419-20; 2 Bancroft's History of the Constitution, 473, (letter Cutting to Jefferson), the Supreme Court of Massachusetts declared void statutes providing that in suits brought by absentees during the Revolutionary War to recover debts, judgment for all interest accruing during the war should be suspended until further action of the Legislature."

In order to ascertain the real character of these two "precedents," we must examine in detail the two magazine articles referred to. But before doing that, we must consider "4 Halsted, 427," wherein the existence of *Holmes v. Walton* as a precedent is officially "vouched." As already stated, the report in question is that of the case of *State v. Parkhurst*, supposed to have been decided in 1802. In that case, Mr. Chief Justice Kirkpatrick, who presided for many years over the New Jersey Supreme Court, is supposed

to have said, inter alia:

"At an early period of our government, while the minds of men were yet unbiassed by party prejudices, this question was brought forward, in the case of Holmes v. Walton, arising on what was then called the seizure laws. There it had been enacted that the trial should be by a jury of six men; and it was objected that this was not a constitutional jury; and so it was held; and the act upon solemn argument was adjudged to be unconstitutional, and in that case inoperative. And upon this decision the act, or at least that part of it which relates to the six men jury, was repealed, and a constitutional jury of twelve men substituted in its place. This, then, is not only a judicial decision, but a decision recognized and acquiesced in by the legislative body of the state."

This would seem to be testimony of the highest character; and one is rather surprised at Mr. Meigs' doubts on the subject. But upon looking at the matter closer, and with a more critical eye than is possessed by the usual run of precedent-seeker—and Mr. Meigs is not to be classed with his later imitators—we shall find these doubts more than justified. A glance at "4 Halsted, 427" will show the need for caution. As already stated, 4 Halsted was published twenty-six years after the alleged decision in State v. Parkhurst, and forty-eight years after the alleged decision in Holmes v. Walton. And the circumstances under which the appendix to this volume made its appearance are not at all reassuring

to the historical student, for the reasons already stated. Nor is the nature of its contents calculated to allay the suspicions of the careful investigator. Everyone in any way connected with either of the cases was dead; and the report was concededly not based on any official documents. As to the sources of his information, Mr. Halsted says:

"The reporter is indebted to the politeness of the late Chief Justice Kirkpatrick for the following opinion delivered by him in the case of the State v. Jabez Parkhurst in the year 1802."

Chief Justice Kirkpatrick died shortly before the appearance of this report, and Mr. Halsted does not say when the Chief Justice gave him this copy of an alleged opinion delivered in 1802; nor does he give any explanation why the opinion was not published until 1828. And an examination of Mr. Chief Justice Kirkpatrick's alleged opinion throws further doubt on the subject: Its whole tenor shows that it was written not for the purpose of deciding a pending case, but for the purpose of bolstering up the Judicial Power. It is well to remember in this connection that the year 1802 was also a period of great controversy over the Judicial Power.

Under this concatenation of suspicious circumstances one might well pause before accepting the passage quoted above as sufficient evidence in itself of the constitutional import of Holmes v. Walton. There is at least a possibility, to begin with, that Mr. Halsted had either written or at least edited Judge Kirkpatrick's opinion. And there is a very great probability that Judge Kirkpatrick wrote this opinion not in 1802 but shortly before his death, in the midst of the turmoil of controversy over the Judicial Power, and perhaps with a view to the impending great struggle which was the presidential campaign of 1828. Under these circumstances it is more than likely that the old man imagined many things to have happened in 1802 which in reality did not happen. And an examination of the entire case of State v. Parkhurst, and of the real issues therein involved, makes it at least doubtful that the constitutional issue supposed to have been involved in Holmes v. Walton should have been drawn into question in the case in which Judge Kirkpatrick is supposed to have written his opinion. But even if we should assume that the opinion was actually written in 1802, which is extremely unlikely, there is still the possibility that Judge Kirkpatrick not only went out of his way to drag in the constitutional issue which was not necessary for the decision of the case before him, but that under the stress of the struggle of 1802 he was willing to accept some rumor as to the import of the decision in Holmes v. Walton without critical examination as to the true condition of affairs. This would not at all surprise anyone familiar with the

history of the period in our connection, as we shall see when we

come to discuss the "lost" Massachusetts precedent.

But we are hardly left to conjecture as to the period when this opinion was written, or rather, as to when it was not written. A careful reading of the paragraph immediately preceding the one quoted above, referring to *Holmes v. Walton*, and the two paragraphs immediately following it, demonstrates beyond question that this opinion, or at least these passages, could not have been written in 1802. The paragraph immediately preceding the one referring to *Holmes v. Walton* is as follows:

"This (i.e., the question of the power of the judiciary to declare laws unconstitutional) is a question which of late years has been considerably agitated in these United States. It has enlisted many champions on both sides. . . . We may fairly avail ourselves, therefore, not only of the sentiments and decisions which have prevailed in our own state upon the subject, but also of those which have prevailed in our sister states and in the United States."

And the two paragraphs immediately following the one referring to $Holmes \ v. \ Walton$ are as follows:

"In later days, in the case of Taylor v. Reading, a certain act of the legislature, passed March, 1795, upon the petition of the defendants, declaring that in certain cases payments made in continental money should be credited as specie, was by this court held to be an ex post facto law, and as such unconstitutional, and in

that case inoperative.

"And with this decision before them, (for the act was made pending upon the suit,) and as I humbly conceive, fully acquiescing therein as a matter of principle, the legislature afterwards, in January, 1797, passed another act for the relief of the said defendant, Reading, in another way. These two cases in New Jersey, determined upon full consideration, the former in the time of Chief Justice Brearley and the latter in the time of Chief Justice Kinsey, both afterwards brought into the notice, and acquiesced in, and, if I may say so, sanctioned by the legislature, would be sufficient to rule the question. But the force of these cases is greatly increased by the uniform course of decision in other states, particularly Virginia and Pennsylvania, and above all by reported decisions involving the same question in the Supreme Court of the United States of America."

To those who are familiar with the history of our subject it will be news that the question of the power of the Judiciary to declare laws unconstitutional had been "considerably agitated" in the years preceding 1802. It is true that the question of the powers of the Federal Judiciary had been agitated for several years prior to 1802, particularly in connection with the Alien and Sedition laws, but the powers of the state judiciaries were certainly not the

subject of any agitation, and even as far as the Federal Judiciary is concerned, the subject of the power of the courts to declare laws unconstitutional was not part of the agitation-for the simple reason that the Federal courts had never up to Marbury v. Madison declared any law unconstitutional, nor formally even asserted the power to do so. There were, it is true, occasional discussions on the subject; for instance, such as the one between Justices Chase and Iredell in Calder v. Bull. But the general public was hardly aware of these discussions, and there certainly was no agitation on the subject which "has enlisted many champions on both sides." The first paragraph just above quoted could, therefore, hardly have been written in 1802. And this may be said, with even greater emphasis, of the last sentence quoted above. How, it may well be asked, could anyone writing in 1802 speak of "the uniform course of decisions in other states" upholding the power of the Judiciary to declare laws unconstitutional? And how could anyone writing in 1802 say that the power was supported "above all by the reported decisions in the Supreme Court of the United States of America"? It should be remembered that we are speaking of a period ante-dating Marbury v. Madison—that is to say, of a period before the first decision on the subject in the United States Supreme Court. There can, therefore, be no question of the fact that this opinion was not written in 1802, when the case is supposed to have been decided. And for the reasons already stated it is apparent that this opinion was composed very shortly before its publication in 1828. In 1828 it could be truthfully said that the question of the power of the Judiciary to declare laws unconstitutional had been of late years "considerably agitated in these United States," and that the subject had during those "late years" "enlisted many champions on both sides." And in 1828 it could be said, with but a little stretch of the imagination, that the power was supported by decisions in some states, and in the Supreme Court of the United States, although even then it could hardly be truthfully said that the force of the two cases supposed to have been decided in New Jersey was "greatly increased by the uniform course of decision in other states, particularly Virginia and Pennsylvania, and above all, by reported decisions in the Supreme Court of the United States of America."

This brings us to another question in connection with this opinion—the question of the care with which the writer of this opinion, whoever he was, handled his facts. Anyone familiar with the subject knows that there was no such "uniform course of decision" in states other than New Jersey, as is suggested in the passage quoted above. It may also be added that in so far as the state of Pennsylvania is concerned, which is particularly referred to in this passage, there was not a single decision upholding the power until after the publication of the report under consideration,

although the power had been asserted by way of dictum by the majority of the Supreme Court in 1825. But even more interesting is his reference to adjudications in New Jersey, since it is this reference which is, so far, our sole authority for the assertion that this point had been decided in *Holmes v. Walton*. In this connection the reference to the case of *Taylor v. Reading* is of the greatest importance.

According to Judge Kirkpatrick, (assuming that he wrote the opinion referred to herein) there were two cases in New Jersey in which laws were declared unconstitutional prior to State v. Parkhurst: One of them was Holmes v. Walton, and the other Taylor v. Reading, the latter decided somewhere between March, 1795, and January, 1797. Now it so happens that we have fairly full reports of the cases decided in New Jersey since the adoption of the United States Constitution in 1789. But one searches in vain for a report

It is important to note in this connection that we have a series of New Jersey reports purporting to be based on official documents, covering practically the entire period since 1789, although none seem to have appeared contemporaneously until 1806. The first of these volumes, edited by Richard S. Coxe, known as 1 Coxe, and also as 1 N. J. L., seems to have been published in 1816, and contains cases decided in the Supreme Court from April term 1790 to November term 1795; and as an appendix certain cases decided in the Supreme Court commencing with April term of 1789, together with some nisi prius during the same period. The second volume of these reports, edited by William S. Pennington (one of the judges of the Supreme Court) contains reports of cases in the Supreme Court from February term 1805 to February, 1808 (known as 1 Pennington and also as 2 N. J. L.). The third volume, edited by the same reporter, and known as 2 Pennington and also as 3 N. J. L., contains reports of cases in the Supreme Court from May term 1808 to September term 1813. The fourth volume was edited by Samuel L. Southard, who seems to have been the first official reporter acting under a commission from the state. His first volume (known as 1 Southard and also as 4 N. J. L.) contains decisions of the Supreme Court from February term 1818 to November term 1818, which seem to have been reported by him in pursuance to his commission of official reporter, and in addition thereto a section designated as "Additional Cases" covering decisions of the Supreme Court from February term 1816 to September term 1817, which he says in a note were cases "determined subsequent to the publication of the last state reports," and evidently designed to fill the gap between the reports contained in 2 Pennington and the cases reported by Southard under his official appointment, which occurred on February 13, 1818. The next volume in the series, known as 2 Southard and also as 5 N. J. L., contains cases decided in the Supreme Court from the February term of 1819 to May term, 1820. The sixth volume in the series was edited by our friend Mr. Halsted (William Halsted, Jr.), who seems to have succeeded Mr. Southard as official reporter. It covers cases decided in the Supreme Court from November term, 1821, to November term, 1822, and in addition thereto a series of cases supposed to have been determined from April term, 1796, to September term, 1799. The seventh volume in this series, known as 2 Halstead and also as 7 N. J. L., covers cases decided in the Supreme Court from November term, 1822, to May term, 1824; and in addition a separate section containing decisions of the same court from November, 1799, to May term, 1804. This part of the volume is entitled, "Cases decided in the time of Chief Justice Kinsey," and has the following note by the reporter:

"The reporter is indebted to the politeness of Richard S. Coxe, Esq., for the

The eighth volume in this series, which was edited by the same reporter, known as 3 Halsted and also as 8 N. J. L., contains cases in the Supreme Court from September, 1824, to November term, 1826. The next volume in the series, known as 4 Halsted and also as 9 N. J. L., is the volume in which State v. Parkhurst is reported. It contains reports of cases from February term, 1827, to February term,

of this case of Taylor v. Reading, which must have been a great case if Mr. Chief Justice Kirkpatrick's report of it be true—that is to say, if it had actually declared an act of the Legislature unconstitutional. Such cases are considered a matter of importance even in our own day, when the declaration of laws unconstitutional is a matter of almost daily occurrence. It certainly must have been a matter of tremendous importance in 1795. Yet no such case is reported in the various collections of reports, and no searchers after precedents have ever been able to discover any record of such a case. We must therefore assume that there was no such decision, and that the author of this opinion took some vague rumor for an authenticated fact. And if that could have happened with reference to a case supposed to have been decided in 1795 or 1796, we may be pardoned if we consider the report in 4 Halsted worthless as evidence with reference to a case supposed to have occurred in 1780.5

We may now turn to Mr. Austin Scott's article, our only other source of information with respect to Holmes v. Walton. In general, Mr. Scott's article substantiates the story outlined in the opinion attributed to Chief Justice Kirkpatrick, to the effect that in this case an act of the New Jersey Legislature providing for a trial by a jury of six in certain cases was declared unconstitutional. But Prof. Scott fills in the bare outline indicated in the opinion printed in 4 Halsted by giving certain details, which he claims are based upon an examination of the docket of the New Jersey Supreme Court, certain manuscript records of the case still preserved in the archives of that court, and certain statutes passed during the period here under consideration. The full story, as he tells it, is as follows:

1828, and, as an appendix, the case of State v. Parkhurst. It will thus be seen that there is a practically complete series of reports of at least the more important cases from 1789. It will also be noted that Mr. Halsted reported in his first two volumes all the old cases which he considered of importance, in so far as they had not already been reported in 1 Coxe.

⁵ What we have said above with reference to the doubt cast upon the existence of Taylor v. Reading by the fact that it is not included in any of the collections of reported cases applies, of course, with equal force to State v. Parkhurst itself. 2 Halsted presumably contains all the cases occurring between 1799 and 1804, which Mr. Coxe had collected and which Mr. Halsted considered important enough to merit publication. It is also a fact worthy of note in this connection that Mr. Chief Justice Kirkpatrick remained Chief Justice until October 29, 1824, so that Mr. Halsted was official reporter for a period of about three years during Mr. Kirkpatrick's incumbency of the Chief Justiceship. During that period Mr. Halsted had shown his interest in old cases by publishing a series of old reports covering a period from 1796 to 1804, but for some unaccountable reason Chief Justice Kirkpatrick failed to communicate to him his opinion in State v. Parkhurst. This circumstance is accentuated by the fact that, notwithstanding Mr. Halsted's evident interest in old cases and his close association with Mr. Chief Justice Kirkpatrick, this opinion was not communicated by the Chief Justice to Mr. Halsted for the two-year period intervening between the last of the old cases reported by Mr. Halsted in his volume 2 and his volume 4, which appeared in 1828, leaving volume 3 to appear in the meantime without any old cases.

"On October 8, 1778, the New Jersey legislature passed an act designed to prevent commercial intercourse with the British forces who were then encamped on Staten Island, adjacent to New Jersey. This Act was the first of a series known as 'seizure laws,' and made it lawful 'for any person or persons whomsoever to seize and secure provisions, goods, wares or merchandize, attempted to be carried or conveyed, into or brought from within, the lines or encampments, or any place in the possession of the subjects or territories of the king of Great Britain.'"

Under these laws, any person who suspected that another person was carrying goods into or from the British lines could seize the same, bring them before a Justice of the Peace, before whom the case was then heard, and if the goods were found to have been such contraband of war, they were forfeited to the seizer, or in certain proportions to the state and the seizer. All of these laws provided that either party might demand a jury trial. The one in question herein does not say specifically of how many persons the jury should consist, but it does contain the provision that upon the demand being made for a jury, "the same justice is hereby required to grant the same, and to proceed in all other respects as in the like case in the act entitled," etc.,—the reference being to a law passed on February 11, 1775, before the Colony of New Jersey had declared its independence and become the State of New Jersey, commonly known as the Six Pound Act. The Six Pound Act provided for a jury of six in certain cases.

Elisha Walton, the defendant in Holmes v. Walton, was a major of militia of the State of New Jersey, and some time during the summer of 1779 he seized certain goods in the possession of John Holmes and Solomon Ketcham, of the value of about twenty-seven thousand dollars, which he claimed they were carrying from the British lines. He brought them before a Justice of the Peace of Monmouth County, where a trial was had before a jury of six, and the goods adjudged to be contraband, and therefore declared forfeit in accordance with the provisions of the Seizure Law in question. Thereupon, Holmes and Ketcham sued out a writ of error from the Supreme Court against Walton, the case thus acquiring the title of Holmes and ano. v. Walton, under which it has become famous. The case was argued in the Supreme Court in November, 1779, and decided in September, 1780,—the decision being a reversal of the judgment obtained from the Justice of the Peace. Afterwards a new trial was directed.

According to our historians, the point raised by the plaintiffs in error was that the seizure law of October 8, 1778, was unconstitutional because it provided for a jury of six, instead of a jury of twelve; and the reversal was upon the constitutional ground. Subsequently, the seizure law was amended by the Legislature so

as to provide for a jury of twelve. "This, then," Mr. Chief Justice Kirkpatrick is reported to have said in State v. Parkhurst, "is not only a constitutional decision, but a decision recognized and acquiesced in by the legislative body of the state." And Mr. Austin Scott not only fully agrees, but adds certain embellishments of his own, the sum and substance of which is that the course of legislation shows a struggle between the Legislature and the courts, which ended in the Legislature's finally surrendering unconditionally to the courts and providing unqualifiedly for a jury of twelve, whenever a jury is demanded. This final act of surrender, according to Mr. Scott, took place on December 22, 1780, when the Legislature of New Jersey passed a law requiring the Justice of the Peace to grant a jury of twelve in such cases. Previously, and between the time when the case was argued in the Supreme Court and the actual decision by the court, to wit, on Christmas Day, 1779, the Legislature passed an act authorizing the Justice of the Peace to call a jury of twelve. This, says Mr. Scott, was done because of the constitutional point raised in the argument of the Holmes case, and in order to placate the court and prevent an adverse decision. But,—as is usual in the stories of this heroic age, the court was firm, with the inevitable result of an unconditional surrender by the Legislature, as witness the Act of December 22, 1780.

In order that the reader may be able to judge how much of all of this assertion is justified, it will be necessary to look into the Constitution of the State of New Jersey, adopted on July 2, 1776; the actual argument in the case of Holmes v. Walton; and the course of legislation referred to by Mr. Scott, as well as some legislation not referred to by him. But before we proceed to this examination, some further observations should be made upon the condition of the "record" in the case of Holmes v. Walton in the Supreme Court of New Jersey. Referring to this record, Prof. Scott says:

"Persistent search has failed to discover the opinion of Chief Justice Brearley delivered in this case. It was probably an oral opinion and never written. Happily, however, there exists uncontrovertible proof of its import."

Two things must be observed in connection with this statement: In the first place, there is not the slightest vestige of evidence that Mr. Chief Justice Brearley ever delivered an opinion in this case. The Court before whom this case was heard consisted of three judges, of whom Mr. Chief Justice Brearley was one, and there is not the slightest indication anywhere as to which of the judges, if any, ever delivered an opinion. The fastening of an opinion in this case on Chief Justice Brearley is just one of those little details which are sometimes added by this class of historians in order "to

give verisimilitude to a bald and unconvincing narrative." This, however, is of no particular importance. But the question of the existence, and particularly of the import, of such an opinion is quite another matter. As to this, it is important to note that this is not a case where the papers have been lost. On the contrary, the files of the Supreme Court of New Jersey contain two packages of papers in connection with this case,—one of them quite a voluminous one,—containing all sorts of unimportant matter, such as depositions, etc., but no opinion. Nor is there any indication anywhere, either among these papers or in the docket of the Supreme Court, which has also been preserved, indicating that an opinion was ever written. To anyone really interested in discovering the truth of the matter, this alone should be sufficient proof that there was no such opinion. It should be remembered that if the claims advanced on behalf of Holmes v. Walton be true it was the first instance of a declaration of an act of legislation unconstitutional by a state court in this country. Clearly, therefore, no court would have made such a decision without writing an opinion; and no opinion of this kind, if written, could have been lost, when all the papers in the case, including a lot of unimportant trash, have been carefully preserved, for nearly one hundred and fifty years.

But if no such opinion was given, either orally or in writing, why was the case reversed? Our answer is that the decision was not at all on constitutional grounds, and was not considered important enough for any opinion to be written thereon. And we shall put forward the bold claim that the examination which we are about to make conclusively proves that the decision could not have been on constitutional grounds. So that this is not merely a case in which there is no proof for the assertion of a constitutional decision, but of a complete demonstration that there was no con-

stitutional decision.

We have already stated that the law of October 8, 1778, did not provide for a jury of six, but simply that upon the demand of a jury the Justice was required to grant the same, and "to proceed in all other respects as in the like case" provided in the Six Pound Act. The State Constitution of July 2, 1776, provided that all laws "lately published by Mr. Allinson" and all others not "incompatible" with the Constitution should be continued in force."

The Six Pound Act hereinbefore referred to was one of the laws contained "in the edition lately published by Mr. Allinson." It was thus continued in force by Article XXI of the Constitution, but only in so far as it was not "repugnant to the rights and privileges contained in this Charter," of which rights trial by jury was a fundamental one. It is the theory of Mr. Chief Justice Kirk-

Those who may be interested to pursue this inquiry further will find a statement of all the pertinent provisions of the New Jersey Constitution in a footnote to the article in St. John's Law Review.

patrick, as reported in 4 Halsted, and of Mr. Austin Scott and all the others who point to Holmes v. Walton as a "precedent," that this provision in the Constitution of New Jersey for trial by jury guaranteed a jury of twelve. And their assertion is that the point raised by counsel for Holmes and Ketcham was that the act of October 8, 1778, was unconstitutional in that it provided for a jury of six only. As a matter of fact, the latter assertion is utterly unfounded, and would in fact have been incorrect if made. For as we have already pointed out, the seizure law of October 8, 1778, did not provide for a jury of six, but only for a jury, and that the justice was to "proceed in all other respects" than those specifically provided for in the Seizure Law in accordance with the Six Pound Act of February 11, 1775. If, therefore, the contention were true that the constitutional provision for trial by jury meant trial by a jury of twelve, then clearly the provision for a jury contained in the Act of October 8, 1778, which was in the identical language, must have meant trial by a jury of twelve, and any court would have so construed it even if the provision for a jury had not been followed by the phrase "in all other respects," clearly excluding the question of jury from the purview of the Six Pound Act. If "a jury" meant a jury of twelve in the Constitution, it meant the same thing in the Seizure Law. Also, the Six Pound Act was only preserved by the Constitution in so far as it was not repugnant to the Constitution. If, therefore, a jury of six was considered repugnant to the constitutional provision in question, the Six Pound Act of February 11, 1775, stood clearly repealed to that extent. The provision of the seizure law of October 8, 1778, for a jury must have meant a jury such as is provided by the Constitution, and nothing else.

This was, in fact, the argument made by counsel for Holmes and Ketcham, in so far as the argument can be gathered from the Bill

of Exceptions filed by them.

This brings us down to another interesting phase of the case—not as it actually occurred, but as it appears in retrospect to the eye of the beholder of "precedents." Anyone reading the now current literature of the subject would imagine not only that the constitutional question was squarely raised, but also that it was the only question raised, so that a reversal would necessarily imply a sustaining of the constitutional objection. As a matter of fact, the so-called "constitutional" point was one of eight points noted in the Bill of Exceptions, being the seventh in order, and following a point to the effect that "the said Elisha Walton did at his own expense, and without the consent of said John and Solomon, treat with strong liquors the jury sworn to try this cause after they were impanelled and appeared, and before they gave their verdict in the said cause." This in itself is sufficient to indicate the importance attached to this alleged constitutional point by the counsel who

made it. But of even greater interest is the wording of the so-called constitutional point itself. It is worded as follows:

"Because the jury sworn and who tried the above cause, and on whose verdict judgment was entered, consisted of six men only, when by the laws of the land it should have consisted of twelve men."

It will be noticed that no reference whatever is made here to any constitution, but merely to the laws of the land. Evidently the point counsel intended to raise was that the law of October 8, 1778, itself provided for a jury of twelve. Which was undoubtedly a correct interpretation of the act, assuming that the Constitutional provision for trial by jury meant by a jury of twelve. It is true that subsequently counsel for the plaintiffs in error, evidently as an after-thought, filed "Additional Reasons" for the reversal of the judgment—the "Reasons" being the substitute for our Bill of Exceptions—and in these additional reasons the constitution is referred to. These Additional Reasons are as follows:

"For that the said Justice had not Jurisdiction of the said cause or plaint but the same was coram non judice.

"For that the Jury who tried the said plaint before the said

Justice consisted of six men only contrary to law.

"For that the Jury who tried the said plaint before the said Justice consisted of six men only contrary to the Constitution of New Jersey.

"For that the proceedings and trial in the said plaint in the court below, and the judgment thereon given were had and given contrary to the Constitution, practices and laws of the land."

Two things are to be noted about these "Additional Reasons": In the first place, there is still a separate reason, that the jury of six is not according to "law," as distinct from the point that it is not according to the Constitution, and this point is put foremost. Secondly, that even in this document there is no reference to any unconstitutionality of any law, but merely that the jury before which the defendants were actually tried was not in accordance with the Constitution. The meaning of this document, particularly when taken in connection with the original "Reasons," is quite evident: Counsel for Holmes and Ketcham were, in so far as this particular question of the jury of six is concerned, making the point, first and principally, that under the law of October 8, 1778, they were entitled to a trial by a jury of twelve men; and then, that even if the law of October 8, 1778, does not specifically provide for it, the Constitution does. The point, however, was never raised, and clearly was never intended to be raised, that the law of October, 1778, was unconstitutional—the argument of counsel for plaintiffs

in error clearly being that if the law of October 8, 1778, does not expressly provide for a jury of twelve by merely saying "a jury," then it is silent on the subject, and the constitutional provision comes into play by guaranteeing "a jury," which means a jury

of twelve according to the "practice and laws of the land."

So much for the argument: Now as to the decision. being no opinion, it is of course impossible to say on what grounds the reversal was had. It might just as well have been because of the strong liquor with which Major Walton plied the jury, or on any one of the other six grounds enumerated in the original "Reasons." One thing is certain, however, and that is that the reversal was not on the seventh ground mentioned in the original "Reasons" and enlarged upon in the "Additional Reasons," i.e., that the reversal was not on constitutional grounds. We have already mentioned the absence of any opinion, which, we believe, is in itself sufficient proof of the fact that this was not an important constitutional decision. It is easy to understand why no opinion should be written when a judgment is reversed because the plaintiff plied the jury with strong liquor, or because of insufficiency of evidence, which was among the other points mentioned in the "Reasons"; but it is utterly inexplicable if the reversal were on constitutional grounds. But there is more than this negative proof. The subsequent course of legislation in the State of New Jersey to which Mr. Scott points with so much assurance as bearing out his theory, in fact completely demolishes it, and proves to a mathematical certainty that this was not a constitutional case.

As already suggested, in order to get the real import of this course of legislation, more than what Mr. Scott mentions in his article must be considered. We shall begin, however, with what Mr. Scott himself refers to. The first piece of legislation which Mr. Scott considers in this connection is the Act passed on Christmas Day, 1779, which authorized the Justice of the Peace to summon a jury of twelve. The preamble to this Act specifically says that the change, empowering the Justice to call a jury of twelve, was due to the fact that "Causes of Considerable Value may, by Virtue of this or the before cited Acts, be prosecuted before a Justice of the Peace, wherein it may be prudent to have the judgment of a greater Number than six jurors." Mr. Scott in effect says that this statement by the New Jersey Legislature was a subterfuge. That the real reason why the Justice was empowered to call a jury of twelve was not because it might, in the opinion of the Legislature, be prudent to do so in some of the cases, because of the size of the amount involved; but that the real reason was the argument made the previous November in the Supreme Court by counsel for Holmes and Ketcham. We know of no reason to suspect the Legislature of New Jersey of dissimulation in this matter, and the subsequent course of New Jersey legislation on this subject proves

to our mind, at least, that the Legislature meant exactly what it said.

The next enactment of the New Jersey Legislature in this connection is the Act of December 22, 1780, already referred to which in Mr. Scott's opinion marked the unconditional surrender by the Legislature to the courts. We shall discuss this question of "surrender" further on. For the present, we desire to note that the difference between the two acts in so far as the jury is concerned is only the logical outgrowth of the Act of December 25, 1779. That act, as we have seen, empowered the Justice to summon a jury of twelve, because the magnitude of the amounts involved in these cases sometimes made it prudent to have trial by a jury of more than six. But if that be so, it is only fair and just that the question of the size of the jury should not be left to the discretion of the Justice of the Peace, but should be a matter of right to the party litigants themselves, whose interests were at stake. Hence the provision of the latter enactment requiring the Justice of the Peace to summon a jury of twelve whenever either of the parties demanded such a jury. Indeed, there is some doubt as to whether the second Act was intended to be a change of the law of December 25, 1779, and not an explanation of the same.

The Act of December 22, 1780—which was in the nature of a supplemental act to the original seizure law—was followed by a more comprehensive enactment in the nature of a substitute for all preceding seizure laws, passed on June 24, 1782. The pream-

ble to this act reads as follows:

"Whereas sundry Acts have been passed at different Periods since the Commencement of the present War with Great Britain, for preventing the Subjects of this State from trading with the Enemy, and from going into or coming out of their Lines without lawful Permissions or Passports; and as several of those Laws have been at different Times in Part repealed and altered in such Manner as to render them difficult in some instances to be clearly understood; for Remedy whereof, etc."

Then follow various enactments, including a provision that whenever a jury is demanded, a jury of twelve shall be summoned, irrespective of whether or not the demand was for a jury of twelve, and also creating special tribunals consisting of three Justices instead of one, before whom such cases were to be tried when no jury

was demanded by either side.

In order that we may understand the bearing of this last mentioned enactment on this question of a six or twelve man jury, it must be borne in mind that there is no claim that the Act of December 22, 1780, was not sufficient to meet the so-called constitutional requirements. On the contrary, Mr. Austin Scott points to that enactment as the final surrender by the Legislature to the

courts. He therefore fails altogether to refer to the act of June 24, 1782—as if the Act of December 22, 1780, were the end of the development of the law of the subject. But it certainly was not. And the omission to refer to the Act of June 24, 1782, was entirely unjustified. For this last enactment throws light upon the two preceding ones, in that it shows that the Legislature was doing exactly what it professed to do, namely, trying to evolve a proper body of laws, both substantive as well as procedural, concerning trading with the enemy, quite irrespective of any decisions by courts, or imaginary constitutional questions. It also shows that the original acts had been drawn carelessly, and that their administration raised various questions as to their meaning, questions that had nothing to do with constitutional problems, but very much so with the administration of justice.

But the *Holmes* case, and the so-called constitutional question raised thereby, cannot be finally disposed of by a mere consideration of the seizure laws, even if we include the Act of June 24, 1782. The final answer to its pretensions is given by an examination not of the seizure laws, but of the general laws with respect to jury trials then prevailing in the state of New Jersey—a matter which Prof. Scott, for some unaccountable reason, failed

entirely to consider.

Our point of departure must be the so-called Six Pound Act of February 11, 1775, which was itself a re-enactment of a similar earlier law. The substance of this law was: That cases involving property up to six pounds in value (except certain cases specifically excepted from the operation of the act) were to be tried before a Justice of the Peace, and that each party to the suit was to have the right to demand a jury trial, in which event the case was to be tried by a jury of six men. This act further provided that where a jury was demanded by the plaintiff, and his recovery was for forty shillings or less, he was to pay the costs of the suit, thus practically imposing a penalty on the demand for a jury trial in small cases. Such was the law at the time of the enactment of the first seizure law, on October 8, 1778, and such it continued to be until June, 1782. It seems that in June, 1782, a general revision of the laws took place. We have already seen that on June 24, 1782, a comprehensive seizure law was enacted to take the place of the seizure laws which had been passed previously, and to bring order out of the chaos which existed in connection with the administration of those laws owing to the careless manner in which the original law and various amendments and supplements thereto had been drafted. But before the enactment of this new Seizure Law, and on June 5, 1782, the Legislature also enacted a new Six Pound Actnow become a Twelve Pound Act. This Act was a comprehensive revision of the Six Pound Act of February 11, 1775, the principal change being an enlargement of the jurisdiction of the inferior courts from six to twelve pounds. Following were the important provisions of the Twelve Pound Act of June 5, 1782:

1. The jurisdiction of the Justices' courts was enlarged from six pounds to twelve pounds—the Justices being empowered generally to proceed in all respects in accordance with the provisions of the old Six Pound Act except as specifically modified by this Act.

2. When a jury shall be demanded in any suit brought before a Justice of the Peace in consequence of the Directions of this Act for any Sum exceeding six Pounds, such jury shall

consist of twelve Men.

3. Where the Plaintiff in any case shall sue or prosecute before a Justice of the Peace for any sum above six pounds and shall demand a Jury of twelve Men, and the verdict be in favor of the said Plaintiff for a sum above forty shillings and not exceeding six pounds, the costs of the Jury shall be paid equally by the Plaintiff and the Defendant.

Taking these provisions in connection with what we know of the Six Pound Act which it replaced, we have the following situation: (1) Under the provisions of this act the six-man jury was continued in all cases tried in these inferior courts, except where the amount involved was over six pounds; (2) Where the amount involved was over six pounds and a jury of twelve was demanded, and the recovery was over forty shillings but not exceeding six pounds, the plaintiff was punished by having to pay half the costs of the jury; (3) Where the amount sued for was over six pounds and a jury of twelve men demanded, and the recovery was for forty shillings or less, the plaintiff was punished to the extent of the entire costs of the jury.

It will thus be seen that the six man jury was continued by the Act of June 5, 1782, notwithstanding the alleged decision of the Supreme Court in the Holmes case, holding such a jury unconstitutional. This raises the very interesting question: What was the law in New Jersey with respect to six-man juries in cases other than seizure laws, during all the time from the adoption of the Constitution on July 2, 1776, and until the passage of the Twelve Pound Act of June 5, 1782? This is not only an interesting question in itself, but a question which the learned historians who wrote concerning Holmes v. Walton should have inquired into very carefully before they decided on the "import" of the alleged opinion of Chief Justice Brearley, or on the meaning of the decision in the Holmes case. Clearly, if six man juries became unconstitutional

Chief Justice Brearley, or on the meaning of the decision in the Holmes case. Clearly, if six-man juries became unconstitutional upon the adoption of the Constitution of July 2, 1776, all citizens were entitled to twelve-man juries, and not only smugglers. How does it happen, then, that this question was never raised until Holmes v. Walton? Furthermore, if it be true that that case

decided that six-man juries were unconstitutional, and the Legislature recognized this decision and surrendered to the courts, as claimed on behalf of Chief Justice Kirkpatrick and by Prof. Scott, by repealing that part of the seizure law of 1778 which provided for a six-man jury-how is it that the Six Pound Act, which affected everybody and not only smugglers, remained unamended during all of the time from the rendition of the decision in Holmes v. Walton on September 7, 1780, to June 5, 1782, when the Twelve Pound Act was enacted? And finally-how is it that the lastmentioned Act continued the six-man jury in the face of Holmes v. Walton?

The answer is simple: The supposed constitutional decision in Holmes v. Walton is the figment of an over-heated imagination caused, first, by party passion, and then by mistaken "patriotic" zeal.

But we are not at the end of this interesting story as yet. For the proof of the wholly mythical character of the great case of Holmes v. Walton is writ large in the reports of authentic cases adjudicated in the courts of New Jersey. For an examination of the adjudicated cases, reports of which have reached us, clearly discloses the fact that the six-man jury has been a permanent institution of the judicial system of New Jersey continuously from colonial times, at least until the adoption of the Constitution of 1844, undisturbed by any adverse decision of the courts touching its constitutionality.

In this connection it must be remembered that the Constitution of 1776 remained continuously in force in New Jersey until the adoption of the Constitution of 1844, and that if a six-man jury was declared unconstitutional in 1780 it must have continued unconstitutional at least until the Constitution of 1844 was adopted. But the reports of actual cases adjudicated by the Supreme Court of New Jersey, as collected in what is now the official series of reports, show that six-man juries were a part of the legal machin-

ery of New Jersey during all of that period.

The first case reported in which this question was involved is that of Falkenburgh v. Cramer, decided in 1790, and reported in 1 N. J. Law, at page 31. That was a case decided under the Twelve Pound Act of 1782 above referred to. The demand in this case was for £11 19s. 11d. A venire was issued for twelve men, in accordance with the provisions of the Twelve Pound Act, but only six men appeared, whereupon the parties consented to try their case before a six-man jury. The trial resulted in a verdict for the plaintiff for £8 11s., and judgment was entered accordingly. The defendant thereupon appealed, on the ground that the Twelve Pound Act of 1782 specifically provided for a jury of twelve men where the demand was for more than six pounds,—the contention of the defendant being that consent of the parties was of no avail

to make a trial by a six-man jury permissible, in face of the express provision of the statute. The Supreme Court upheld that contention, and reversed the judgment in a per curiam opinion reading as follows:

"Per Curiam: Reverse the judgment. The consent of parties cannot avail against the express words of the act of the Legislature."

The next case involving this question was Parker v. Munday, decided in 1791 and reported in 1 N. J. L. page 70. This case again involved a trial before a jury of six by consent of the parties in a matter involving more than six pounds. Again the defendant appealed, claiming that the consent does not permit the use of such a jury, and again the Supreme Court upheld that contention. The opinion in this case reads:

"Per Curiam: By the Act of Assembly of June 5, 1782, a demand above £6 is to be tried by a jury of twelve men. This proceeding is therefore contrary to the express provision of the law, and consent cannot cure the want of jurisdiction or supersede the express words of the Act of Assembly. Reverse the judgment."

Here we have as authoritive a statement by the New Jersey Supreme Court itself as could possibly be desired, that the only reason a six-man jury was improper in cases above £6 in 1791 was the Act of Assembly of 1782. That under that Act a jury of six men is still proper in cases involving less than £6. And that had that Act so provided, a jury of six would have been constitutional no matter what the amount.

The next case involving this subject of which we have a record is Ashcroft v. Clark, decided in 1819 and reported 5 N. J. L. 577. Here the opinion of the Court was written by Mr. Chief Justice Kirkpatrick, whose alleged dissenting opinion in the apocryphal case of State v. Parkhurst gave the Holmes case its first start on the road to fame. After giving a long list of reasons why the judgment for the plaintiff in the case here under consideration should be reversed, the Chief Justice adds:

"Besides all this, the demand is for fifty dollars, and the trial is by a jury of six men. For all these causes, let the judgment be reversed."

It will be observed that the only reason a jury of six was considered improper in this case was that the demand was for fifty dollars, which was evidently not in accordance with the statute. It should be noted here that at some time between the decision in Parker v. Munday and Ashcroft v. Clark the Twelve Pound Act had been amended by the Legislature so as to make sixteen dollars the point of division between a six-man jury and a twelve-man jury.

This appears from the next case to be considered here—Jones

v. Oliver, decided in 1823 and reported 7 N. J. L. 123. It should be mentioned here that this case, too, was decided under Judge Kirkpatrick's Chief Justiceship. In this case the summons was issued for forty-five dollars. On the return day the plaintiff filed a demand for six dollars. The defendant counter-claimed for thirty-three dollars. The plaintiff then demanded a jury. The case was tried before a jury of twelve. The jury gave a verdict for the plaintiff for six dollars, for which amount judgment was entered in his favor. Thereupon, the defendant appealed, on the ground that a trial by a jury of twelve was improper, since the recovery was only for six dollars, and the statute provided that cases under sixteen dollars should be tried before a jury of six men only. There was no opinion written by the court in this case, but the arguments of counsel are illuminating. The argument of counsel for the defendant is given in the official report as follows:

"Halsey, now moved to reverse the judgment; because the trial was had before a jury of twelve men instead of six, and cited the nineteenth section of the small causes act, (Rev. Laws 634) and the supplement thereto, (sec. 4, p. 772) which enact, 'that in every action which shall be brought before any Justice of the Peace by virtue of this act, it shall and may be lawful for either of the parties, after the defendant has appeared, or put in his plea to such an action, and before the said Justice has proceeded to inquire into the merits of the cause, to demand a trial by jury, which the said Justice is required to grant: and thereupon a venire shall be issued to summon a jury of six men, and no more, if the debt or demand do not exceed the sum of sixteen dollars, or a jury of twelve men, and not less, if the debt or demand exceed the sum or value of sixteen dollars.'"

Vroom, for the plaintiff, did not even attempt to argue that under the New Jersey Constitution all cases ought to be tried before juries of twelve, and merely contented himself with the argument that the true meaning of the statute is that if either party demanded more than sixteen dollars the case should be tried before a jury of twelve men, and that, since in this case the defendants' demand was for thirty-three dollars the case was properly tried before a jury of twelve.

The plaintiff's contention as to the true meaning of the statute was upheld by the Supreme Court. And it is interesting to note in this connection that the court came to this conclusion only "after taking time to consider." In other words, the court were evidently at first impressed by the argument of the counsel for the defendant in this case that the case had to be tried before a jury of six only, and that a jury of twelve was improper, because the true

meaning of the Act of Assembly required a jury of six instead of

a jury of twelve in such cases.

All of which, of course, stamps as utterly absurd the contention that the Holmes case decided that under the New Jersey Constitution of 1776 a jury of six was unconstitutional. And even more so the contention that the Legislature acquiesced in this construction of the Constitution and repealed the offending provision to the contrary in the Seizure Law of 1778. The true situation as shown by the authentic records of courts and Legislature was exactly the reverse: In a series of enactments covering this entire period the Legislature steadily adhered to the six-man jury in certain cases, and the courts as steadily not only upheld, but never even questioned the power of the Legislature to do so. Exit the great "precedent" Holmes v. Walton.

And its passing involves also the passing of Taylor v. Reading and of State v. Parkhurst as constitutional decisions. It also raises the very interesting question: Is it at all possible that Chief Justice Kirkpatrick should have written the opinion attributed to

him in 4 Halsted?

The so-called "lost" Massachusetts "precedent" is in a somewhat different category from Holmes v. Walton. For one thing, its certificate of naturalization is still under a cloud, even among historians whose "loyalty" to the Judicial Power is beyond suspicion. One would not think so from the categorical language of the paragraph which we have quoted from the report of the Special Committee of the New York State Bar Association. But then, that Committee seems to have been composed of particularly uncritical people-notwithstanding the eminence at the Bar of some of its members. More critical students of the subject have been rather cold to this particular "precedent." Even so zealous a precedent-seeker as Professor Haines voices serious doubts as to this particular case. In his The American Doctrine of Judicial Supremacy, which appeared before the report of the learned Committee of the New York State Bar Association, and with which work that Committee were undoubtedly familiar when they made their report, Professor Haines says on this subject:

"On the basis of a thorough examination of the evidence it is claimed that no case can be found at this time in which the legislature on the suggestion of the Supreme Court repealed a statute because of unconstitutionality. The absolute supremacy of the legislature after the renunciation of allegiance to the British Crown makes it unlikely that such a decision would have been rendered relative to a law contrary to the state constitution."

This throws an interesting light on the mores of the historiographers of our subject. It is safe to say that in no other field of

historical inquiry would it be possible for a responsible committee of a responsible professional association to make such an unqualified statement as that made by the Special Committee of the New York State Bar Association with respect to Brattle v. Hinckley in face of the statement just above quoted from Professor Haines' work. In this connection it should be remembered that Professor Haines' book was the latest work on the subject at the time the learned New York Committee made their report, and that the Committee could not have made any independent investigation of its own which could have led it to a different conclusion. The fact is that Professor Haines and the Special Committee relied upon the same source of information-Mr. A. C. Goodell's article in the Harvard Law Review already referred to. How is it, then, that the learned Committee came to the opposite conclusion from Professor Haines? The answer is simple: The years 1910-1915 were a period of political storm and stress, with the judiciary as the main storm-centre, very much like the period 1827-1828, which brought forth the great cases of Commonwealth v. Caton and Holmes v. Walton; and the Special Committee of the great Bar Association of the State of New York was battling for the Lord. It therefore conceived its duty to be not a critical examination of the historical facts, with a view to ascertaining the truth, but the forging of weapons wherewith to smite the infidel and the heretic. And a donkey's jaw-bone was a good enough weapon when nothing better could be found.

The intervening years since the appearance of the Special Committee's report have not been exactly years of calm and composure, but there seems to be no immediate danger threatening our cherished institution. We may therefore be now ready to examine the question of the "lost" Massachusetts "precedent" with a finer critical instrument than that used by the Committee.

To begin at the beginning: George Bancroft, in an appendix to his History of the Constitution of the United States, gives an extract from a letter written by J. B. Cutting to Thomas Jefferson,

dated July 11, 1788, in which Cutting says:

"I have also enclosed . . . the manly proceeding of a Virginia Court of Appeals. Without knowing the particular merits of the cause, I may venture to applaud the integrity of judges who thus fulfil their oaths and their duties. I am proud of such characters. They exalt themselves and their country, while they maintain the principles of the Constitution of Virginia and manifest the unspotted probity of its judiciary department. I hope you will not think me too local or statically envious when I mention that a similar instance has occurred in Massachusetts, where, when the Legislature unintentionally trespassed upon a barrier of the Constitution, the judges of the Supreme Court solemnly determined that the particular statute was unconstitutional. In the very next session there was a formal and unanimous repeal of the law, which, perhaps, was unnecessary."

It is a rather curious circumstance—not entirely devoid of significance—that our first source of information with reference to this "lost" case should be a writer who "ventures to applaud" "without knowing the particular merits of the cause." Evidently Mr. Cutting was an early battler for the Lord—and so did not trouble about giving the particulars of the Massachusetts case any more than he cared about finding out the merits of the Virginia cause which he was applauding. As a result, we are still vainly searching for the case and its facts more than one hundred and forty years afterwards. Or rather, to be exact, we have been searching—for the search was given up nearly forty years ago upon the appearance of Mr. Goodell's article in the Harvard Law Review. For Mr. Goodell conclusively proved that there was no such case—although he evidently thought it his "patriotic" duty to soften the blow by suggesting that there may have been "a couple of other fellows."

Mr. A. C. Goodell, Jr., was the editor of the "Acts and Resolves of the Province of Massachusetts Bay," and a great authority on early Massachusetts history in its various legal aspects. It was therefore natural that when our judicial history became a matter of keen interest after the appearance of Mr. Meigs' article with its collection of precedents, Mr. Goodell should be appealed to for assistance in the rediscovery of the Cutting case briefly referred to by Mr. Meigs. Mr. Goodell thereupon went over the ground carefully and thoroughly, and the results of his exhaustive examination of the original records were stated by him in a long letter to a friend—really an article some four or five thousand words long—published in the issue of the Harvard Law

Review for February, 1894.

The substance of Mr. Goodell's article is to the effect that there was no case in the Massachusetts courts during the period in question in which the courts declared any statute enacted by the Massachusetts Legislature void because of alleged repugnancy to the Massachusetts Constitution. Nor has he been able to discover any instance in which the Legislature of Massachusetts had repealed a statute at the direction or suggestion of the courts. Mr. Goodell goes even further and states his conviction to be that during the period in question the Legislature was recognized as supreme in Massachusetts, and that the setting aside of any law as void for "unconstitutionality" in our sense, was, therefore, quite out of the question. In this connection Mr. Goodell says:

"I had occasion to discuss this pre-constitutional subordination of the judiciary in some remarks I made at the meeting in May

last of the Massachusetts Historical Association, upon Judge Samuel Sewall's refusal of a writ of habeas corpus to a prisoner committed by authority of a special Act of Legislature. The views I advanced were rather earnestly questioned at the meeting. But since then Mr. Senator Hoar, who took part in the debate, has called my attention to a speech by Roger Sherman reprinted in Paul Ford's recent publication of contemporary essays on the Constitution, in which the same opinion is expressed. In a more recent letter, the Senator frankly says: 'I have no doubt (of the correctness of) your statement as to the unlimited power of our Legislature before the Constitution, subject always, as you limit it, to the royal prerogative.'"

Thus is Mr. Cutting's "case" definitely disposed of. But, curiously enough, in thus laying to rest the ghost of Cutting's "lost precedent," Mr. Goodell created—or, rather, furnished the excuse for the creation of—another imaginary precedent, to wit: Brattle v. Hinckley. The story of the creation of Brattle v. Hinckley is not only curious but instructive as well. We shall therefore state it in some detail.

Mr. Goodell rightfully assumed that Cutting must have had some peg on which to hang his story: In other words, that there must have been some case which might, to a careless man and zealous partisan, look like the case he would have liked perhaps to have happened. And in going over the lists of cases he came to the conclusion that the case of Brattle v. Hinckley, which happened about this time, came nearest to that description, and he therefore concluded that that was the case Cutting had in mind. But in trying to find an excuse for Cutting's egregious error, Mr. Goodell permitted himself to indulge in some wholly unwarranted speculations of his own. As a result, the next crop of zealot-partisans turned his entire structure upside down. So that instead of proving that there was no "Massachusetts precedent"—which was the evident purpose of his article—he merely gave the child a name.

We are not particularly interested, however, in apportioning the credit or discredit for the imaginary history of Brattle v. Hinckley between Mr. Goodell and the learned Special Committee of the New York State Bar Association, but rather in showing how small, and utterly shadowy, are the acorns out of which the great oaks of our "precedents" usually grow. We shall, therefore, tell the story, and let the reader judge for himself. Here are the facts as reported by Mr. Goodell:

On August 15, 1785, Thomas Brattle brought two actions in debt on two bonds executed by the defendants in the two cases (Hinckley and Putnam) to his intestate in 1770 and 1771, respectively. The defendants appeared, admitted the original obliga-

tion, and pleaded, in bar, that the intestate, being an inhabitant of Boston, on the twentieth day of April, 1776, joined with the fleet and army of the King of Great Britain, then warring with the Colonies, and became an absentee and remained such ever after, until his death, within the dominions of, and subject of said King, and that, therefore, the court, in rendering judgment ought not to compute interest on the sum mentioned in the bond between April 19, 1775 and January 20, 1783, in conformity to the Resolve of the Massachusetts Legislature of November 10, 1784, which had been revived and continued by the Resolve of February 7, 1785, which provided that in suits brought by absentees judgment for all interest accruing between the aforesaid dates, that is, during the war, should be suspended until further action by the Legislature. The plaintiff demurred to this plea in bar, but judgment was awarded on the demurrer to the defendants.

The plaintiff thereupon appealed from this judgment to the Supreme Court—the original action having been brought and the judgment rendered in the inferior Court of Common Pleas. In the Supreme Court the plaintiff waived his demurrer and pleaded, by way of replication, that William Brattle, plaintiff's intestate, died at Halifax, October 16, 1776, "and that his estate descended and vested to Thomas Brattle, and to Katherine Wendell, his children and heirs, who, at the time of commencement of this action, were, and ever since have been, citizens of this Commonwealth, and not aliens nor absentees." The defendants-appellees demurred, in turn, to this replication; and on the issue thus joined the following judgment was given by the Supreme Judicial Court:

"And after a full hearing of said parties upon the said pleas, the Court are of opinion that Appellee's plea is insufficient to bar the appellant of the interest during the war."

Such are the facts and judgment in this case. And now as to

their legal implications.

That this case had nothing to do with the Constitution of the State of Massachusetts is clear, and Mr. Goodell expressly so states. It therefore could have had nothing to do with any right, or claimed right, of the courts of Massachusetts to declare legislation unconstitutional on the ground that it is repugnant to the state constitution; and, as we have already seen, Mr. Goodell is firmly of the opinion that no such right existed or was claimed at the time. But Mr. Goodell is also satisfied that J. B. Cutting had this case and no other in mind. According to Mr. Goodell, Cutting could have had no other case in mind for the simple reason that no other case existed upon which such an implication could be fastened—the Brattle cases being the only ones even remotely resembling the case referred to by Cutting. And here is Mr. Goodell's explanation as to how Cutting came to have made the

statement contained in his letter to Jefferson about the Brattle cases: During this period, says Mr. Goodell, people sometimes referred to our obligations under the Treaty of Peace as the "constitution." And it is his opinion that the decision of the Supreme Court overruling the defendant's demurrer to the plaintiffs' plea in replication was based upon the fact that the Resolves pleaded by the defendants were contrary to the provisions of the Treaty of Peace with Great Britain, under which the British creditors were not to be hindered in the collection of their just

claims, which would include interest.

Before considering the relevancy

Before considering the relevancy of all of this to the question of the Judicial Power, we should note here the following additional facts which bear on this topic, and which help identify Brattle v. Hinckley as the case which Cutting had in mind when writing to Jefferson: The Congress of the United States on March 21, 1787, adopted resolutions which declared, first, that the Legislatures of the several states cannot of right pass any acts for construing, limiting, or impeding the operation of any national treaty; second, that all such acts repugnant to any such treaty ought to be forthwith repealed; and thirdly, that it be recommended to the several states to make such repeal rather by describing and by reciting the objectionable Acts than by declaring their repeal in general terms. The passage of these resolutions was followed by the issue of a circular Letter to all the states, embodying the resolutions and fully declaring and explaining the principles involved. This letter was approved by a vote of Congress April 13, 1787; and on the thirtieth of April, 1787, the Legislature of Massachusetts passed an Act in the very words prescribed in the congressional resolutions. It is Mr. Goodell's opinion that Cutting must have had in mind this act of the Massachusetts Legislature of April 30, 1787, when he said in his letter to Jefferson that the Legislature repealed the Act which the courts had declared void.

It will be noted that even if all of these surmises as to the relation of the Brattle case to the Peace Treaty, the "Resolves" of the Massachusetts Legislature pleaded by the defendants, and the act of the Massachusetts Legislature of April 30, 1787, be correct, the case still has absolutely nothing to do with the question of Judicial Power. For there is not the remotest connection between the right of a court to disregard a legislative act of an inferior political government because it is in conflict with the commands of the superior political government, and the right of the courts to disregard a law of their own Legislature because of alleged repugnancy to the Constitution of their own government. And, concededly, the repugnancy surmised by Mr. Goodell was between the action of an inferior government and the commands of a superior government, for in so far as our foreign relations were concerned the states were inferior governments to that of the United

States—these being the very principles involved and explained in the circular letter of Congress to the States, of April 13, 1787.

But as a matter of fact there is no basis for Mr. Goodell's surmises as to the real meaning of the decision of the Supreme Judicial Court of Massachusetts; although he is probably right in assuming that Mr. Cutting had the Brattle cases in mind when he wrote to Jefferson. This only proves how utterly unworthy even contemporary testimony of this kind is when it comes from such a partisan as J. B. Cutting evidently was. It also shows that even such careful research workers as Mr. Goodell are willing to "stretch a point" in order to give at least an excuse for the claim of a precedent, when they have determined that there really is no precedent.

The incorrectness of Mr. Goodell's surmise as to the real meaning of the decision of the Supreme Judicial Court of Massachusetts in the Brattle cases is proven by two facts: The first is, the change of position by the plaintiff from that which he took in the lower court to that which he took in the superior court. It will be recalled that in the lower court the plaintiff demurred to the plea of the defendants, who relied on the Resolves of the Massachusetts Legislature of November 10, 1784, and February 7, 1785. This demurrer challenged the legal efficacy of these Resolves as a plea, and we may assume, for the purpose of this discussion, that the challenge was on the ground of their repugnancy to the Treaty of Peace. But after the plaintiff was defeated in the lower court, he evidently changed his mind on the advisability of resting his case on a challenge to the Resolves of the Legislature. For in the Supreme Court he withdrew his demurrer, and in place thereof pleaded by way of replication certain facts. The legal meaning of this change was that he withdrew his legal challenge to the efficacy of the action of the Legislature, and attempted to avoid the force of this action by pleading certains facts which he believed took his cases out of the purview of the Resolves. The facts which the plaintiff pleaded in his replication were, that William Brattle, the absentee, is dead, and therefore out of the picture; and that his heirs were good and loyal citizens of the Commonwealth and not aliens or absentees. And the Supreme Judicial Court, by its decision, held nothing further than that the facts thus alleged in the replication were sufficient to take the case out of the purview of the Resolves of the Legislature pleaded by the defendants. The so-called "constitutional question," even in the sense surmised by Mr. Goodell, was therefore out of the case when the case came up for adjudication by the Supreme Judicial Court. Hence there is not the slightest ground for the assertion that the Supreme Judicial Court passed upon any such question. In fact, we cannot see how the Supreme Judicial Court could have done so on the issues as framed by the parties.

That the Supreme Judicial Court could not possibly have held

the "Resolves" in question void is also proven by another fact mentioned by Mr. Goodell. He states that at the very term at which the Brattle cases were decided by the Supreme Judicial Court, that Court gave a decision for the defendants in a case which was exactly similar to the Brattle cases, except that the original absentee himself sued, instead of heirs who were good American citizens, as in the Brattle cases. In speaking of the meaning of the decision in the Brattle cases, Mr. Goodell says:

"The precise significance of the decision of these cases, however, is not apparent on the record, and is rendered still more doubtful by a directly opposite decision at the same term, upon an issue raised by pleadings which failed to show clearly that they differed essentially from Brattle's in the ground of the action or in the nature of the defense. This was an action (likewise of debt, and in which the plea was similar) brought by the Rev. Dr. Henry Caner, of London, previously rector of King's Chapel, Boston, against Houghton, et al., to recover the principal and interest on a bond given to him by the defendants before the Revolution."

This is putting it rather oddly. For when the Brattle and the Caner cases are compared, it is quite clear what the difference between the two cases was, and therefore what the ground of decision in the Brattle Case really was. And that leaves no room for doubt that unconstitutionality was not the ground of decision. In the Caner case the efficacy of the legislative Resolves was evidently challenged, and the decision went in favor of the validity of the Resolves. In the Brattle cases, on the other hand, the attack upon the efficacy of the Resolves was withdrawn, but their force was avoided by the plea in replication, which stated facts which took them out of the purview of the Resolves, and the decision therefore went for the plaintiff.

It only remains to be noted in conclusion that the facts recited by Mr. Goodell also clearly demonstrate that the so-called "repeal" had no more to do with the decision of the Court than the decision itself had anything to do with constitutional "precedents." It is clear beyond the peradventure of a doubt that the Act of April 30, 1787, was the direct result of the circular letter of Congress of April 13, 1787, and had nothing whatever to do with any previous decision of the Supreme Judicial Court or any other court. Except, of course, in so far as the Legislature of Massachusetts may have been moved to act promptly because the courts of Massachusetts considered themselves bound to follow its Resolves rather than the Treaty of Peace.

As a "precedent" for the right of the courts to declare void laws enacted by the legislative department of their own government, Brattle v. Hinckley may, therefore, be safely relegated to the realm of fiction, along with Holmes v. Walton. And we may

repeat here what we have said at the conclusion of our investigation into that case:

The supposed constitutional decisions in both Holmes v. Walton and Brattle v. Hinckley are the figments of an over-heated imagination—caused, first by party passion, and then by mistaken "patriotic" zeal."

One must, indeed, possess a peculiar sense of the historic fitness of things to assume gratuitously that the Supreme Judicial Court of one of the leading states of the Union would decide momentous constitutional problems two ways at the same term of court—without giving its reasons therefor in either decision.

APPENDIX D

TWO HISTORIANS ON THE INTENTIONS OF THE FRAMERS

A. PROFESSOR MAX FARRAND

In the main text we had occasion to quote a statement by Professor Farrand a propos of the curious fact—that is, curious from the point of view of the present day upholders of the Judicial Power—that the Judicial Power had never been discussed directly in the Constitutional Convention. Because of the importance of Professor Farrand's statement as showing the mores of our historians and the psychology of the upholders of the Judicial Power, we shall quote its selient portion.

quote its salient portion again. Professor Farrand says:

"The difficulty is easily solved. The question did not come up in connection with the discussion of the jurisdiction of the federal courts. At different times in the sessions of the convention, however, it was proposed to associate the federal judges with the executive in a council of revision or in the exercise of the veto power. At those times it was asserted over and over again, and by such men as Wilson, Madison, Gouverneur Morris, King, Gerry, Mason, and Luther Martin, that the federal judiciary would declare null and void laws that were inconsistent with the constitution. In other words, it was generally assumed by the leading men in the convention that this power existed. Perhaps Madison expressed this in the best form. He has already been quoted as saying that he 'considered the difference between a system founded on the Legislatures only, and one founded on the people, to be the true difference between a league or treaty, and a Constitution.' He then went on to say: 'A law violating a treaty ratified by a pre-existing law, might be respected by the Judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves, would be considered by the Judges as null & void." (Farrand, The Framing of the Constitution, pp. 156-7)

And in an earlier passage of his book, Prof. Farrand says:

"A proposal to unite the judiciary with the executive in the exercise of the veto power was again rejected and as before one of the chief arguments against it was that it would give the judiciary two opportunities to pass upon the constitutionality of a law." (Farrand, op. cit., pp. 119-120)

On the basis of these statements one has a right to assume:

1. That the delegates to the Constitutional Convention, like the children in the well-known advertisement, cried for the Judicial Power as though it were Fletcher's Castoria, and that they did not cease their crying until they were given full assurance that the Judicial Power was safely in the Constitution.

2. That these assurances were given them by the seven leaders expressly named, who, in common with the other leading men of

the Convention, assumed the existence of that Power.

3. That the chief argument for rejecting the association of the judges in the proposed Council of Revision consisted of these assurances that the Judicial Power was safely in the Constitution, and that to associate the judges in the Council of Revision would, therefore, give them a double-negative on the acts of Congress.

4. That in the course of these debates on the Council of Revision, Madison expressed the general position of the leading men of the Convention, to the effect that the Judicial Power was safely in the Constitution, by certain remarks upon the differences between a League or Treaty, on the one hand, and a Constitution, on the other.

As a matter of fact, nothing would be more unwarranted—to put it very mildly—than such assumptions. An examination of the debates in the Constitutional Convention as reported by Madison

discloses the following:

In the first place, the argument of a double-negative was not the chief argument against associating the judges in the proposed Council of Revision. Elbridge Gerry and Luther Martin were the only delegates who ever advanced that argument—and that only incidentally—and neither was particularly influential in the Convention. Mr. Gerry, at least, let it be known again and again that the arguments decisive with him were of an entirely different character. It may also be assumed safely that Mr. Gerry's opinion on the point would not have carried any weight with the Convention, since he was not even a lawyer, and the question whether or not there was such a thing as the Judicial Power in the Constitution, and how the associating of the judges in the Council of Revision would affect that Judicial Power, were certainly matters for fine lawyers to think about and not for Mr. Gerry to decide.

Professor Farrand is also entirely unwarranted in stating that "it was asserted over and over again" by the men named by him that the Judicial Power existed. The only ones who asserted it were the same Gerry and Martin. The others named conceded it in debate—some with reservations. And everybody knows the difference between an assertion and a concession in debate. And as to Mr. King, there is very serious doubt whether he even conceded it in the Constitutional Convention. At least, Madison's minutes

do not make any mention of it. It is not a fact that James Madison made the remarks quoted by Prof. Farrand in the course of the debate on the proposed Council of Revision. Of course, if the statements quoted actually mean what Prof. Farrand says they mean, it makes no difference in what connection they were made. But, as it happens, the occasion of the statements and the connection in which they were made clearly show that they have no such meaning as is ascribed to them by Professor Farrand. The two statements quoted from Madison were made in the discussion of the manner in which the Constitution ought to be ratified: whether it should be submitted to the State Legislatures or to the people in special conventions. Madison was for submitting it to the people; and his chief argument was that if the Constitution were ratified by the State Legislatures only, the result would be merely a new Confederation of States, while if it were ratified by the people, the result would be a new Nation. The two statements are part of the same speech delivered by Madison on July 23rd—while the subject of ratification was up for consideration. The report of his remarks says:

"Mr. Madison thought it clear that the legislatures were incompetent to the proposed changes. These changes would make essential inroads on the state constitutions; and it would be a novel and dangerous doctrine, that a legislature could change the constitution under which it held its existence. There might indeed be some constitutions within the Union, which had given a power to the legislature to concur in alterations of the federal compact. But there were certainly some which had not; and, in the case of these, a ratification must of necessity be obtained from the people. He considered the difference between a system founded on the legislatures only, and one founded on the people, to be the true difference between a league or treaty and a constitution. The former, in point of moral obligation, might be as inviolable as the latter. In point of political operation, there were two important distinctions in favor of the latter. First, a law violating a treaty ratified by a pre-existing law might be respected by the judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves would be considered by the judges as null and void. Secondly, the doctrine laid down by the law of nations in the case of treaties is, that a breach of any one article by any of the parties frees the other parties from their engagements. In the case of a union of people under one constitution, the nature of the pact has always been understood to exclude such an interpretation." (Elliot's Debates, V, pp. 355-6)

It is clear that Madison was not discussing the subject of Judicial Power in which we are interested—that is to say, the right of the Judiciary of a sovereign state to declare unconstitutional a law enacted by the Legislature of its own sovereignty. What

Madison was discussing here was the possible or probable action of the state judges with respect to an act of the state legislature in violation of the Federal Constitution. And even as to that, he was not considering any act at all, but a particular act, namely, an attempt by the legislature to repeal the act of ratification, and withdraw the state from the Union. In other words, he was discussing the possibility of an attempted secession, and the legality of a secession ordinance. As to that, he argued, that if the Constitution were only ratified by the state legislatures, the state judges would be bound to obey a secession ordinance passed by the state legislature, for the Union would then in fact be only a League of States. Each state would then remain absolutely sovereign, and its judges would therefore be bound to obey any law passed by their own Legislature, no matter how immoral, unwise or perfidious But that if the Constitution were ratified by the people, a secession ordinance would be illegal, and not binding on the state judges, because in a Union the states are not absolutely sovereign but subordinate to the Union.

If this passage has any bearing at all on the question of Judicial Power as we understand it, it means exactly the reverse of what is assumed by Professor Farrand. Instead of being an assurance that the right of the Judiciary to declare laws unconstitutional is safely lodged in the Constitution, it is actually an assertion that in sovereign governments the Judiciary is bound to obey any law passed by the Legislature, no matter how immoral, unwise, or perfidious. But whatever we may think of the implications of this passage against the Judicial Power, one thing is certain, and that is—it contains nothing which asserts the existence of the Judicial Power as we know it. And yet, according to Professor Farrand, this is supposed to be the "best form" in which the thought of the Constitutional Convention on the subject was put. And we must confess that in the latter respect, at least, Professor Farrand is right-at least to this extent: Not only was the subject of the Judicial Power never discussed in the Convention directly, but there never was any clear expression of it by anybody on the floor of the Convention. All that there was were some incidental and desultory remarks in the course of the discussion of a different subject. Madison's vague words may therefore have been the Convention's best expression of its thought on the subject.

But more important than all this is the false impression created by Professor Farrand as to what happened at the Federal Convention when the assertions of the existence of the Judicial Power were made. The way Prof. Farrand puts it, one must gain the impression that these assertions went unchallenged—so that the delegates to the Convention had a right to take at their face value the supposed assurances of the leading men who assumed the existence of this power. As a matter of fact, the assertion of the power did not go unchallenged, and on the last occasion when the assertion was made, it provoked quite a notable discussion, which must have proved to the delegates that there was at least a serious division of opinion on the subject. If, therefore, it were true, as Professor Farrand clearly intends to assert in the quoted passage, that the delegates wanted to put the Power into the Constitution, they certainly would not have left it in the unsettled condition in which the discussion must have left it, but would have insisted on its being provided for in an unequivocal manner, so that there could be no doubt about it. And in view of the supposed unanimity, or at least substantial agreement, on the subject, which Professor Farrand presupposes, it would have been unheard of folly for them not to have done so.¹

B. PROFESSOR CHARLES A. BEARD

At about the same time that Professor Farrand was gliding lightly over the difficulties of this subject, Professor Charles A. Beard undertook the laborious task of proving what Professor Farrand so light-heartedly assumed. In his book The Supreme Court and the Constitution he undertook to prove from the historic evidence extant as to the intentions of the framers of the United States Constitution that the Federal Convention intended to put the Judicial Power into the Constitution, and actually put it there, or at least believed that it did. Professor Beard does not claim that the proposition was ever squarely put up to the Federal Convention, or that the Convention squarely passed upon it; and he expressly admits that the members of the Constitutional Convention were not unanimous on the subject, and that it actually contained several opponents of the Judicial Power. But the reason for the absence of an express grant is explained by him in the same manner as it is explained by Prof. Farrand, namely, that it was assumed that the Judiciary possessed such a power and would exercise it under the Constitution as one of its normal functions. His own summary of the evidence favorable to his contention is as follows:

"Summing up the evidence: we may say that of the leading members of the Convention no less than fourteen believed that the judicial power included the right and duty of passing upon the constitutionality of acts of Congress. Satisfactory evidence is afforded by the vote on the Judiciary Act that three other leading members held to the same belief. Of the less prominent members, we find that three expressed themselves in favor of judicial control and three others approved it by their vote on the Judiciary Act.

¹See, infra, Prof. Corwin's opinion on the subject in connection with the discussion of Prof. Beard's claims.

We are justified in asserting that twenty-five members of the Convention favored or at least accepted some form of judicial control. This number understood that federal judges could refuse to enforce unconstitutional legislation." (Beard, The Supreme Court and the Constitution, pp. 50-51)

He then reviews briefly the evidence on the other side, finding that the opposition was limited to four members who had expressly opposed judicial control in the Convention itself, one of whom he disqualifies. He then proceeds as follows:

"The 'avowed opponents' do not seem to have been 'many'; but whether they and the unavowed opponents were many or few, they must have been fully aware that most of the leading members regarded the nullification of unconstitutional laws as a normal function. The view was more than once clearly voiced in the Convention, and any delegate who was not aware of such implications must have been very remiss in the discharge of his duties. . . .

"In view of these discussions and the evidence adduced above, it cannot be assumed that the Convention was unaware that the judicial power might be held to embrace a very considerable control over legislation and that there was a high degree of probability (to say the least) that such control would be exercised in the

ordinary course of events.

"The accepted canons of historical criticism warrant the assumption that, when a legal proposition is before a law-making body and a considerable number of the supporters of that proposition definitely assert that it involves certain important and fundamental implications, and it is nevertheless approved by that body without any protests worthy of mention, these implications must be deemed part of that legal proposition when it becomes law; provided, of course, that they are consistent with the letter and spirit of the instrument. . . .

"In balancing conflicting presumptions in order to reach a judgment in the case, it must be remembered that no little part of the work of drafting the Constitution was done by the Committee of

Detail and the Committee of Style.

"The former committee, appointed on July 24, consisted of Rutledge, Wilson, Ellsworth, Randolph and Gorham. Of these five men, two, Ellsworth and Wilson, had expressly declared themselves in favor of judicial control, and Wilson seems to have been the 'dominating mind of the committee.' . . . The article dealing with federal judicial power, as reported by the committee, contained most of the provisions later embodied in the federal Constitution.

"After lengthy debates on the draft submitted by the Committee of Detail, a committee of five was created to revise and arrange the style of the articles agreed to by the Convention; and Johnson,

Hamilton, Gouverneur Morris, Madison, and King were selected as members of this committee. Of these five men four, Hamilton, Morris, Madison and King, are on record as expressly favoring judicial control over legislation." (Beard, op. cit., pp. 55, 63-64)

Turning our attention first to the first assertion—namely, that twenty-five out of fifty-five members of the Constitutional Convention "favored or at least accepted some form of judicial control"—it may be remarked that Prof. Beard managed to get his imposing total of twenty-five, where other historians could only count about eight, or at most a dozen, primarily by the simple device of forgetting the differences between the various forms of "judicial control," even to the extent of forgetting the differences between control of state legislation on the one hand and of federal legislation on the other. By this method, the present writer could be counted among the supporters of the Judicial Power, for he "accepts" some form of "Judicial Control"—namely, control by the Federal Judiciary of state legislation, under certain reservations and safeguards.

But even that was insufficient to bring up the total to more than twenty-three, as the reader may find out by adding up the numbers assigned to the different groups by Prof. Beard in his summing up of the evidence, so he added two more, whom he mentions in a footnote. These two are Brearly and Livingston of New Jersey, whom Prof. Beard includes in his total because of their "connection" with the case of Holmes v. Walton. Our readers know already what that famous "precedent" really amounted to. In this they have, of course, an advantage over Prof. Beard, who naturally swallowed it whole. But even that would only explain Brearly, who was one of the judges in the case. But what "connection" did Livingston have with that phantom precedent? Prof. Beard does not vouchsafe us any information on the point. And certainly the records do not disclose any such connection.

For the rest, we shall quote here Professor Edward S. Corwin's opinion of the results of Professor Beard's labors in unearthing evidence of the claimed intentions. And it may be remembered in this connection that Professor Corwin is a great admirer of John Marshall and an enthusiastic supporter of the Judicial Power.

In reviewing Professor Beard's labors on this point, Professor Corwin says:

"Thus of the twenty-five members set down by Mr. Beard as favoring judicial review of acts of congress seven are so classified simply on the score of their voting two years after the Convention for the Judiciary Act of 1789, the terms of which do not necessarily assume any such power, though they do not preclude it. Of another six, only utterances are quoted which postdate the Convention, sometimes by several years. Furthermore, by far

the two most important members of this group are Hamilton and Madison, the former of whom apparently became a convert to the idea under discussion between the time of writing Federalist 33 and Federalist 78, and the latter of whom is proved by the very language which Mr. Beard quotes to have been unfavorable both in 1788 and 1789. Again another four are reckoned as favoring the power of judicial review proper on account of judicial utterances antedating the Convention from five to seven years, though these utterances, at the time they were made, were in one instance sharply challenged by public opinion and in the other by judicial opinion. Only eight of the twenty-five acknowledged the power on the floor of the Convention itself, and of these eight three were pretty clearly recent converts to the idea, while some of them seemed to limit the power to its use as a means of self defense by the court against legislative encroachment. On the other hand the idea was challenged by four members of the Convention; and although they were out-numbered, so far as the available record shows, two to one by the avowed advocates of judicial review, yet popular discussion previous to the Convention had shown their point of view to have too formidable backing to admit of its being crassly overridden. Despite, therefore, the sharp issue made in the Convention, not a word designed to put the view of the majority beyond the same contingencies of interpretation to which it was at the moment exposed in the state constitutions was inserted in the national constitution, though on the other hand nothing to nullify the manifest hopes of the majority was inserted either." (Edward S. Corwin, American Political Science Review, 1913, p. 330)

Considerable might be added to what Professor Corwin has said. And we say some of these things in the margin. The result is, we believe, to reduce considerably the number allowed by Professor Corwin.² But we do not consider that very important, as we agree

"For the prisoners, it was contended . . . that the act of assembly was contrary to the plain declaration of the constitution; and, therefore, void The attorney general, in reply, insisted . . . that the act of assembly pursued the spirit

² While we cannot here enter into a detailed examination of Prof. Beard's "proofs," the following may be mentioned by way of illustration of Prof. Beard's method. Edmund Randolph and George Wythe, both of Virginia, are among the twenty-five Framers whom Prof. Beard counts among the supporters of Judicial Review. As to Randolph, Prof. Beard admits that he did not express himself in the Constitutional Convention itself on the subject, but he cites certain utterances of Randolph's made subsequent to the adjournment of the Convention which he believes to be sufficient proof of his contention. As to Wythe, he relies on his apocryphal speech in Commonwealth v. Caton as sufficient proof of his adherence to the doctrine of Judicial Review. But Prof. Beard carefully omits to mention the fact that Randolph, according to the report of that same case, expressly denied the right of Judicial Review. Randolph was the attorney-general of Virginia, at the time when Commonwealth v. Caton was up for consideration before the court of which Wythe was a member, and he made the argument on behalf of the commonwealth which secured the decision. Here is an extract from Mr. Call's report of the argument in the case:

with Professor Corwin that it is not a question whether or not the supporters of the Judicial Power out-numbered its opponents, but whether or not there were supporters and opponents, and the proper inferences which should be drawn from the fact that with this diversity of opinion known, nothing was done by the Convention.

But Professor Beard does not merely count noses. He lays particular stress on the share taken by the men named by him in the Convention; and, as appears from the passages quoted above, he lays particular stress on the fact that supporters of the Judicial Power were on the two important committees which he mentions. But we fail to see just how the presence of four alleged supporters of the Judicial Power on the Committee on Style has anything to do with the question under discussion. For the Committee on Style did absolutely nothing with reference to any part of the Constitution bearing on our subject. In fact, the Committee on Style did very little with reference to any part of the Constitution, except what it was directed to do, namely, "to revise the style and arrange the articles."

The Committee on Detail, on the other hand, did have a lot to do with the framing of the Constitution. But again, not with any part affecting our subject, and Professor Beard's statement as to the work done by this Committee in connection with our subject is not borne out by the record. In speaking of the work of the

Committee of Detail, Professor Beard says:

"The article dealing with federal judicial power, as reported by the committee, contained most of the provisions later embodied in the federal Constitution." (Beard, op. cit., p. 65)

It should be noted, in the first place, that the above statement—evidently intended to impress the unwary—would be unimportant if true. For no one claims now that the particular wording of the Constitution has anything to do with the granting or withholding of the right of Judicial Review. Indeed, Professor Beard's own thesis is, not that the Constitution contains such an express

of the constitution. But that, whether it did or not, the court were not authorized to declare it void."

Incidentally, this detail also throws some light on Prof. Haines' method. It will be recalled that Prof. Haines says that in this case an "act to condemn for treason" was "held not valid because senate did not concur." As was explained in our main text in connection with this case, two "acts" were involved in this case. One was an act of assembly, that is to say, a law which governed the questions of pardon in case of treason, and the other was a resolution of the house of delegates pardoning Mr. Caton, in which latter the senate did not concur. Randolph took the position that the pardon, upon which the prisoners relied, was invalid because the senate did not concur and it was, therefore, not an act of the Legislature, but that the treason act, which the prisoners attacked, was valid because it was in the spirit of the constitution and that in any event the court could not disregard it even if it were not in accordance with the constitution. He was upheld in both contentions: the resolution of the house of delegates was held to be inoperative, and the act of assembly was held valid.

grant in any of its clauses, but that no express grant was given because the power to declare legislation unconstitutional was considered to be part of the normal exercise of the Judicial Power.

But the statement is simply not in accordance with fact. In so far as any claim has ever been made by anybody that the Judicial Power rests on any language used in the Constitution, the article dealing with our subject as reported by the Committee of Detail did not contain the crucial words upon which such claim is based. As we have already pointed out, those who seek to base the power on the language of the Constitution as distinguished from the structure of the government provided by it, rely upon the clause of the Constitution which says that "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties, made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary not-withstanding."

The argument from the language of the Constitution is based upon the words italicized by us—the argument being that the Constitution being a law of the land, and therefore cognizable in the courts, the judges, who are concededly to expound the law, must take cognizance of the Constitution as a law. There, therefore, results, in the given contingency, a conflict between two laws. And since the Law of the Constitution is superior to the Law of Congress, the judges must abide by the former and disregard the latter. The crucial phrases in this connection, therefore, are, "This Constitution" and "law of the land." But neither of these crucial phrases was contained in the draft submitted by the Committee of Detail. As reported by the Committee of Detail this paragraph

read:

"The acts of the legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States, shall be the supreme law of the several states, and of their citizens and inhabitants; and the judges in the several states shall be bound thereby in their decisions, any thing in the constitutions or laws of the several states to the contrary notwithstanding."

According, therefore, to the argument from the language of the Constitution, the clause as reported by the Committee of Detail was fatal to the Judicial Power. The Constitution was not made a law. But, on the contrary, the acts of the federal legislature were made the law of every state, and the judges were to be bound by them. We do not mean to be understood as saying that we draw this conclusion. But merely, that this is the correct conclusion according to those who argue from the language of the Constitution.

stitution. And since Professor Beard has suddenly shifted his ground from the position of "normal exercise of judicial functions" to that of the implications of the language of the Constitution, the actual facts are fatal to his position, in so far as the composition of

the Committee of Detail has any significance.

We must, however, absolve the Committee of Detail from any blame in the matter. For, notwithstanding the assertions of Professor Beard, the Committee of Detail had precious little to do with the matter one way or another. The paragraph as reported by the committee was merely a reproduction, with some changes of style only, of the resolution previously adopted by the Convention itself before the matter was referred to the Committee of Detail. And the words which those who argue from the language of the Constitution consider important were also added by the Convention itself, after the report of the Committee of Detail, and before the draft went to the Committee on Style. (Elliot's Debates, V, pp. 375-379)

Before leaving this interesting discussion, we must revert for a moment to the "accepted canons of historical criticism." As we have seen, Professor Beard claims that those canons "warrant the assumption that, when a legal proposition is before a law-making body and a considerable number of the supporters of that proposition definitely assert that it involves certain important and fundamental implications, and it is nevertheless approved by that body without any protests worthy of mention, these implications must be deemed part of that legal proposition when it becomes

law."

We shall not quarrel with Professor Beard over the canons of historical criticism as defined by him. But—what of it? What legal proposition was put in this connection before the Constitutional Convention? Does Professor Beard mean to assert that anybody ever put before the Federal Convention the square proposition that by adopting a written constitution whereby the powers of government are divided into three co-ordinate and independent branches of government, the Legislature having only limited powers, the Judiciary would be given the sole and exclusive right of defining the meaning of the Constitution, and that the Legislature and Executive would be bound thereby?

And does he mean to say that such a legal proposition was not only put before the Federal Convention, but that it found a con-

siderable number of supporters?

And does he mean to say that this proposition was approved by that body without any protest worthy of mention?

But Professor Beard has more than one string to his bow. If we are not satisfied with his proof as to the actual intentions of

the Framers as shown by their expressed opinions as known to us, he is ready to prove that they must have had those opinions. In a chapter entitled The Spirit of the Constitution, but which really deals with the Spirit of the Framers, he undertakes to prove that the general views of the men who engineered the framing and adoption of the Constitution on the subjects of government, democracy, liberty, property, and such like, were of a nature to compel the assumption that they were in favor of the Judicial Power, and therefore they must have put it into the Constitution. This argument from the "Spirit of the Constitution" could easily, and we believe conclusively, be answered by the well-known fact that the framers of the United States Constitution did not frame such a constitution as they wanted to, but such as they thought the people would accept, and that, with the exception of a few scholars and theorists like Madison, most of the Framers spent most of their time, when they were not trying to reconcile sectional and other particularistic differences, trying to find out how near they could come to putting into the Constitution what they wanted without running the risk of having it defeated. Assuming, therefore, that the Framers were actually all supporters of the Judicial Power in their private capacity, it does not at all follow that they must have put it into the Constitution, since as Framers they had more than their own views to consider.

We cannot, however, leave it at that, because of the broad hint thrown out by Professor Beard suggesting the "putting it over" theory—if it be true that the Framers, because of their "Spirit," were in favor of the Judicial Power, then they must have "put it over" on an unsuspecting public. It must, of course, be admitted even by Professor Beard, that the Constitutional Convention contained at least a few men who could not possibly be charged with being a party to such a shabby piece of business. But then, as Professor Beard has told us, these honest souls may have been

"very remiss in the discharge of their duties."

We must, therefore, follow Professor Beard into this branch of

his argument.

"The men who framed the federal Constitution—says hewere not among the paper-money advocates and stay-law makers whose operations in state legislatures and attacks upon the courts were chiefly responsible, Madison informs us, for the calling of the convention. . . .

"The makers of the federal Constitution represented the solid, conservative, commercial and financial interests of the country—not the interests which denounced and proscribed judges in Rhode Island, New Jersey and North Carolina, and stoned their houses in New York. . . .

"When independence had been gained, the practical work to be

done was the maintenance of social order, the payment of the public debt, the provision of a sound financial system, and the establishment of conditions favorable to the development of the economic resources of the new country. The men who were principally concerned in this work of peaceful enterprise were not the philosophers, but men of business and property and the holders of public securities. For the most part they had had no quarrel with the system of class rule and the strong centralization of government which existed in England. It was on the question of policy, not of governmental structure, that they had broken with the British authorities. By no means all of them, in fact, had even resisted the policy of the mother country, for within the ranks of the conservatives were large numbers of Loyalists who had remained in America, and, as was to have been expected, cherished a bitter feeling against the Revolutionists, especially the radical section which had been boldest in denouncing the English system root and branch. In other words, after the heat and excitement of the War of Independence were over and the new government, state and national, was tested by the ordinary experiences of traders, financiers, and manufacturers, it was found inadequate, and these groups accordingly grew more and more determined to reconstruct the political system in such a fashion as to make it subserve their permanent interests. . . .

"In short, it was a war between business and populism. Under the Articles of Confederation populism had a free hand, for majorities in the state legislatures were omnipotent. Anyone who reads the economic history of the time will see why the solid conservative interests of the country were weary of talk about the 'rights of the people' and bent upon establishing firm guarantees

for the rights of property. . . .

"They (the Framers) were equal to the great task of constructing a national system strong enough to defend the country on land and sea, pay every dollar of the lawful debt, and afford sufficient guarantees to the rights of private property. The radicals, however, like Patrick Henry, Jefferson, and Samuel Adams, were con-

spicuous by their absence from the convention. . . .

"They were not convened to write a Declaration of Independence, but to frame a government which would meet the practical issues that had arisen under the Articles of Confederation. The objections they entertained to direct popular government, and they were undoubtedly many, were based upon their experience with popular assemblies during the immediately preceding years. With many of the plain lessons of history before them, they naturally feared that the rights and privileges of the minority would be insecure if the principle of majority rule was definitely adopted and provisions made for its exercise. . . . It is small wonder, therefore, that under the circumstances, many of the members of that

august body held popular government in slight esteem and took the people into consideration only as far as it was imperative 'to inspire them with the necessary confidence,' as Mr. Gerry frankly

put it.

"Indeed, every page of the laconic record of the proceedings of the convention preserved to posterity by Mr. Madison shows conclusively that the members of that assembly were not seeking to realize any fine notions about democracy and equality, but were striving with all the resources of political wisdom at their command to set up a system of government that would be stable and efficient, safeguarded on one hand against the possibilities of despotism and on the other against the onslaught of majorities. . . . Mr. Randolph in offering to the consideration of the convention his plan of government, observed 'that the general object was to provide a cure for the evils under which the United States labored; that, in tracing these evils to their origin, every man had found it in the turbulence and follies of democracy; that some check therefore was to be sought for against this tendency of our governments; and that a good Senate seemed most likely to answer the purpose.' . . .

"They were anxious above everything else to safeguard the rights of private property against any levelling tendencies on the part of the propertyless masses. Gouverneur Morris, in speaking on the problem of apportioning representatives, correctly stated the sound historical fact when he declared: 'Life and liberty were generally said to be of more value than property. An accurate view of the matter would, nevertheless, prove that property was the main object of society.' . . . Various projects for setting up class rule by the establishment of property qualifications for voters and officers were advanced in the convention, but they were defeated. On account of the diversity of opinion that prevailed, agreement was impossible, and it was thought best to trust this

matter to the discretion and wisdom of the states.

"Nevertheless, by the system of checks and balances placed in the government, the convention safeguarded the interests of property against attacks by majorities. The House of Representatives, Mr. Hamilton pointed out, 'was so formed as to render it particularly the guardian of the poorer orders of citizens,' while the Senate was to preserve the rights of property and the interests of the minority against the demands of the majority. In the tenth number of The Federalist, Mr. Madison argued in a philosophic vein in support of the proposition that it was necessary to base the political system on the actual conditions of 'natural inequality'... the unequal distribution of wealth inevitably led to a clash of interests in which the majority was liable to carry out its policies at the expense of the minority; hence, he added in concluding this splendid piece of logic 'the majority, having such coexistent

passion or interest, must be rendered by their number and local situation unable to concert and carry into effect schemes of oppression'; and in his opinion it was the great merit of the newly framed Constitution that it secured the rights of the minority against 'the

superior force of an interested and overbearing majority.'

"This very system of checks and balances, which is undeniably the essential element of the Constitution, is built upon the doctrine that the popular branch of the government cannot be allowed full sway, and least of all in the enactment of laws touching the rights of property. The exclusion of the direct popular vote in the election of the President; the creation, again by indirect election, of a Senate which the framers hoped would represent the wealth and conservative interests of the country; and the establishment of an independent judiciary appointed by the President with the concurrence of the Senate—all these devices bear witness to the fact that the underlying purpose of the Constitution was not the establishment of popular government by means of parliamentary majorities." (Beard, op. cit., pp. 74-96)

Having expatiated in this way on the Spirit of the Constitution for twenty-eight pages, and then for some ten pages more in a similar vein on the supporters of the new Constitution, Professor

Beard sums up this branch of his argument as follows:

"Every serious student of the history of our public law and policy has known that the defence of the rights of minorities against majorities is one of the fundamental purposes of our system of government. 'I have thought,' said Mr. Choate in his moving argument in the Income Tax Cases before the Supreme Court, 'that one of the fundamental objects of all civilized government was the preservation of the rights of private property. I have thought that it was the very keystone of the arch upon which all civilized government rests, and that this once abandoned, everything was at stake and danger.'" (Beard, op. cit., p. 111)

The reader need not smile at the spectacle of the author of An Economic Interpretation of the Constitution and of The Economic Origins of Jeffersonian Democracy growing ecstatic over Mr. Choate's argument in the Income Tax Cases. Rather is it an occasion for the shedding of tears. Professor Beard was evidently so moved by Mr. Choate's eloquence that he ceased to be the historian and became the zealous advocate in this matter of judicial control. More than that: He actually adopts in his book Mr. Choate's peculiar mode of forensic argumentation.

In arguing against the constitutionality of the income tax law, in the particular passage quoted by Prof. Beard from Mr. Choate's "moving argument," that great forensic orator appealed to the sacredness of private property—utterly oblivious of the fact that the only issue before the court was whether an income tax is a

direct tax, and must, therefore, be laid according to rule of apportionment, or an indirect one, and may therefore be laid according to the rule of uniformity. Utterly oblivious also of the fact that other civilized countries levied income taxes without in any way dislocating "the keystone of the arch upon which all civilized government rests."

Professor Beard does exactly the same: In arguing for the Judicial Power he appeals to the same "keystone arch" as a "moving argument" in support of his thesis that the Framers must have intended to put it into the Constitution. But in so doing he is forgetful of a few rather important facts which he could not have failed to remember if he were less the advocate and more the

historian. For instance:

1. The Judiciary as a protector of the people's property rights against the rapacity of legislative majorities was then quite unknown. No foreign country had ever tried it. And he himself says that in this country, prior to the adoption of the United States Constitution, majorities in the state legislature were omnipotent. On the other hand, the Framers knew that the civilized world had been going on for several thousand years accumulating and protecting property without this particular safeguard to the "keystone arch." They, therefore, had a right to assume, as subsequently turned out to be true, that the civilized world may go on for a considerable time to come accumulating and protecting private property without the protection of the Judicial Power.

2. The system of government with which the Framers were most familiar, and which their leaders, particularly their most conservative leaders, most admired—the English—did not include this particular protection to the "keystone arch," and managed

to do very well without it.

3. As far as the debates in the Constitutional Convention disclose, the Framers were not particular admirers of the Judiciary. Mr. Gerry, for instance, one of the parade horses usually trotted out on these occasions, and whom Professor Beard quotes in this connection, is on record as stating that he did not want the judges in the particular rôle which Professor Beard says the Framers must have intended to assign to them. On July 21, during the discussion on the Council of Revision, Mr. Gerry said:

"The motion was liable to strong objections. . . . It was making statesmen of the judges, and setting them up as the guardians of the rights of the people. He relied, for his part, on the representatives of the people, as the guardians of their rights and interests."

And no one ever even suggested in these debates that the right of the Judiciary to declare legislation unconstitutional was either necessary or proper for the protection of property rights.

4. Alexander Hamilton, who had more to do with engineering the Constitutional Convention than any other single person, and who was undoubtedly the most outstanding intellectual leader of the very conservative forces whose sentiments Professor Beard so eloquently describes, is on record as favoring at this time, and actually advocating on the floor of the Convention, a scheme of government for the United States which did not include the Judicial Power in any of its phases.

On June 18, while the Convention was deliberating on the various plans in Committee of the Whole, Hamilton made his one great speech in the Convention. In that speech he set forth his views on government in general, explaining his objections to the plans thus far proposed in the Convention. At the conclusion of this speech he submitted a memorandum of a plan of his

own. The opening paragraph of this memorandum reads:

"The supreme legislative power of the United States of America to be vested in two different bodies of men; the one to be called the assembly, the other the senate; who, together, shall form the legislature of the United States, with power to pass all laws whatsoever, subject to the negative hereinafter mentioned."

The "negative hereafter mentioned" was that of the executive alone.

The plan also provided for the appointment of the governors of the states by the federal government, such governors to have an absolute veto on all legislative acts of their respective states, in order to prevent state legislation in conflict with the constitution or laws of the United States.

At the close of the Constitutional Convention Hamilton submitted to Madison his own draft of a full constitution, evidently prepared after the convention draft had been completed. This draft carries out the ideas contained in the memorandum on the subject here under consideration, and accentuates them. The provision with respect to the legislative power of Congress is in the following words:

"The legislature of the United States shall have power to pass all laws which they shall judge necessary to the common defence and general welfare of the Union."

And to emphasize the point, the "law of the land" clause leaves out the Constitution. It reads as follows:

"The laws of the United States, and the treaties which have been made under the Articles of the Confederation, and which shall be made under this Constitution, shall be the supreme law of the land, and shall be so construed by the courts of the several states."

This after the present Constitution was complete with the

Constitution in the clause, so that it must have been left out deliberately. It should be noted that Hamilton's constitution also leaves out from this clause the words "which shall be made in pursuance thereof" which appear in the convention document after "laws"—which further emphasizes the point that Hamilton wanted plenary powers for Congress and not limitations upon its powers.

Indeed, had Professor Beard been engaged in a historical examination, instead of in writing a "moving argument" on behalf of the Judicial Power, this inquiry into the "Spirit" would probably have terminated as soon as it began. Prof. Beard tells us at the very outset of this inquiry that the calling of the Constitutional Convention was due chiefly to the assaults upon property by means of paper-money issues and stay-laws. And yet, the Framers failed to put into the Constitution any prohibition upon Congress either with respect to the issuance of paper-money or the

enactment of stay-laws.

A dispassionate consideration of this apparently anomalous phenomenon might perhaps have helped him to an understanding of the true workings of the Federal Convention. Much more so, at any rate, than his fancy "canons of historical criticism." He might then have discovered that the explanation of this seeming anomaly lies, in the first place, in the simple fact that in the opinion of the leaders of the Convention there was much less danger of assaults upon property from the national legislature than from the state legislatures. He would have found, next, that they were willing to take certain chances with democracy, not only in order "to inspire the people with the necessary confidence," but also from an honest desire to avoid despotism or embarking upon dangerous experiments. But most important of all, he would have found, that in the opinion of the leaders and the majority of the Convention, the Convention had found a solution of the problem confronting the country in the compromises actually arranged, and the system of checks and balance devised, after long deliberations, and open, and sometimes brutally frank, discussions.

Had Professor Beard pondered a little more carefully over the very passages from the debates in the Convention out of which he has woven his "moving argument" à la Choate, he would have noticed that the remarks which he reproduces or abstracts were not made in any theoretical discussions on democracy but in debates on certain concrete propositions—always other propositions than the Judicial Power. And he would then perhaps have concluded that according to the canons of common sense, as well as those of historical criticism, it is only fair to assume that those who expressed those views must have looked to their own concrete proposals, as advocated by them in these discussions, for procrete proposals, as advocated by them in these discussions, for pro-

tection against the evils complained of or feared—rather than to

something which they never mentioned in this connection.

And having adopted that simple canon of historical criticism, he would have seen, for instance, that there was nothing in the "spirit" of what Edmund Randolph, whom he quotes, actually said, to require or justify the assumption that he put the Judicial Power into the Constitution in order to protect the sacred rights of property. For while Randolph did say in his speech introducing the Virginia or Randolph plan "that some check was therefore to be sought against this tendency of our governments" to "the turbulence and follies of democracy," he also said, in the same breath, "that a good Senate seemed most likely to answer this purpose." He then proceeded to talk Senate throughout the weary months that the Convention continued its sessions, but never once mentioned the Judicial Power. What warrant have we then to saddle him with responsibility for the Judicial Power?

And Randolph is typical of the entire Convention.

But then, if Professor Beard had really been making an impartial historical inquiry, he probably would never have written the "Spirit" part of his book. For he would have come to an exactly opposite conclusion at a much earlier stage of his inquiry. The matter is really very simple, and the truth lies at the very threshold of our inquiry. All that it needs to discover it, is not to shut one's eyes to it, after one has rid himself of a few preconceived notions. Professor Beard had once stumbled upon it. But instead of looking at it, he rushed on-carried away by the flow of his eloquence about the "Spirit." The reader will recall Professor Beard's remark to the effect that under the Articles of Confederation, "populism had a free hand, for majorities in the state legislatures were omnipotent." Here was an all-important truth. And had Professor Beard been thinking of history instead of "populism," this truth might have made him free of his incubus of preconceived notions and prejudices.

Let us consider for a moment what it means. Under the Confederation most of the state governments were working under written constitutions. These constitutions were in many respects the models after which the federal Constitution was modelled. Except that in this respect they had one advantage—they almost all of them contained Bills of Rights, which, as everybody knows, are quite invaluable when it comes to the protection of property rights. Yet, populism had a free hand. Majorities in the state

legislatures were omnipotent.

Omnipotent?—And where was the Judicial Power, under which, we are told, the "nullification of unconstitutional laws" was "regarded as a normal function"? We are told that the Framers were no revolutionaries or dreamers, but hard-headed business-men. Even the most revolutionary dreamers could not

have regarded as a "normal function" of the Judiciary, a power that had never, nowhere, been exercised. And how could these hard-headed business-men, whose practical wisdom is recited at such length and with so much fervor by Professor Beard, have taken it for granted that this Pickwickian "normal function" would be found without further ado in the new Federal Constitution, when it could not be found in the much-better circumstanced state constitutions?

A curious thing happened to Professor Beard. In his zeal for the Judicial Power he attempted to ride at one and the same time two wild horses running in opposite directions: the "normal function" theory which is based on long—even though fictitious—lists of alleged "precedents," which means that under the Confederation the powers of state legislatures were limited by the judicial function; and the "muck-raking" theory, which declares that the Framers "put it over" on the people, and which must therefore recognize the fact that under the Confederation "majorities in the state legislatures were omnipotent."

We need not be surprised at the result.

KASHMIR UNIVERSITY

lot al Library

Acc No ... 2.1.2.642

Bated ... 23.1.2.69

ALLAMA IQBAL LIBRARY 212642